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Proving the Lie: Litigating Police Credibility

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Proving the Lie: Litigating Police Credibility

David N. Dorfman*

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I. Introduction

Police lying is not best described as a "*dirty little secret*."¹ For instance, police lying is no "dirtier" than the prosecutor's encouragement or conscious use of tailored testimony² or knowing suppression of *Brady* material;³ it is no more hypocritical than the wink and nod of judges who regularly pass on incredible police testimony⁴ and no more insincere than the demagogic politicians who decry criminality in our communities, but will not legislate independent monitoring of police wrongdoing.⁵

1. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994) (emphasis added).

2. See Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 809 (1990-91); see also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 110 (1992) (noting that a former Chicago prosecutor described suborning tailored police testimony by instructing police witnesses: "if this happens, we win. If this happens, we lose.").

3. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution").

4. See Cloud, *supra* note 1, at 1312; Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1023 (1987) (quoting Donald L. Horowitz, *THE COURTS AND SOCIAL POLICY* 252, (1977)). An account of this refusal to notice police perjury is provided by Alan Dershowitz:

I have seen trial judges pretend to believe officers whose testimony is contradicted by common sense, documentary evidence and even unambiguous tape recordings Some judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness and muteness that guides the vast majority of judges and prosecutors.

Alan N. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17.

5. See Leonard Levitt, *Police Actions Speak Volumes*, NEWSDAY, Oct. 17, 1994 at 20; Jonathan P. Hicks, *Mayor Vetoes Bill Creating a Panel to Monitor Police*, N.Y. TIMES, Dec. 24, 1994, at A1, A28.

Police lying is no “little *secret*” either.⁶ Juries, particularly in our urban criminal courts, are thoroughly capable of discounting police testimony as unbelievable, unreliable, and even mendacious.⁷ Judges, prosecutors and defense attorneys report that police perjury is commonplace,⁸ and even police officers themselves concede that lying is a regular feature of the life of a cop.⁹ Scandals involving police misconduct—brutality, corruption, criminality—are regularly featured in the daily newspapers,¹⁰ and periodic investigation reports and blue-ribbon commis-

6. See Cloud, *supra* note 1 (emphasis added).

7. See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1039 (1996); Joe Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995 at B3 (“Our prosecutors now have to begin their cases defending the cops. Prosecutors have to bring the jury around to the opinion that cops aren’t lying. That’s how much the landscape has changed.”) (quoting Michael Vecchione, Kings County Deputy District Attorney in charge of trials). See also MILTON MOLLEN, REP. OF THE COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROC. OF THE POLICE DEP’T 39 (July 7, 1994) [hereinafter MOLLEN COMM’N REP.]; see also Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 250 (1998); David N. Dorfman & Chris K. Iijima, *Fictions, Fault and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J. LAW R. 861, 886 (1995); see generally Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

8. See Orfield, *supra* note 2, at 107 (noting that the author’s survey study shows that Chicago prosecutors, judges, and defense attorneys agree that police perjure themselves in search and seizure hearings on average 19% of the time; defense attorneys estimate that perjury occurs 53% of the time); see also Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, 596-97 (“Every lawyer who practices in the criminal courts knows that police perjury is commonplace.”); H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR’S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 116 (1988) (stating that police perjury is “prevalen[t]”). It is difficult to measure the amount of lying that occurs:

We know almost nothing about the testilying “rate,” its variations across and within police departments, its changes over time, or its etiology. We cannot say what percentage of testilies are serious (e.g., the invention of an informant, the wholesale manufacture of probable cause) and what proportion are minor (e.g. the exaggeration of a suspect’s furtive gestures or the politeness of an officer’s request for consent to search) Compared with many other offenses, the crime of testilying has been poorly measured, and we should be suspicious of claims that its incidence is known or its causes understood.

Kevin R. Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV 1061, 1062 (1996).

9. See, e.g., MOLLEN COMM’N REP., *supra* note 7, at 36; see also Orfield, *supra* note 4, at 1049-50 (revealing that 76% of police in author’s study acknowledge that police witnesses tailor testimony to prove probable cause to arrest); JONATHAN RUBINSTEIN, *CITY POLICE* 386-88 (1973) (drafting of false police affidavits for search warrants is commonplace).

10. This type of scandal occurred during the Knapp Commission era. See, e.g., David Burnham, *City Opens Study of Policing Police*, N.Y. TIMES, Apr. 24, 1970, at A1; David Burnham, *Graft Paid to Police Here Said to Run Into Millions*, N.Y. TIMES, Apr. 25, 1970 at A1.

sions come up with the same conclusions: police scandals are cyclical; official misconduct, corruption, brutality, and criminality are endemic; and necessarily, so is police lying to disguise and deny it.¹¹

The requirements of the Fourth Amendment's proscription against unreasonable searches and seizures¹² and the issue of police credibility have been closely linked for forty years of academic discussion and study.¹³ At least from the period following *Mapp v. Ohio*¹⁴ up to the

The scandals also were reported during the Mollen Commission era, especially concerning Abner Louima's assault. See e.g., David Koczienewski, *Rooting Out Rogue Cops*, *NEWSDAY*, April 21, 1994, at A5; Dershowitz, *supra* note 4, at A17; Leonard Levitt, *Cracks Appear in the Blue Wall of NYPD Silence*, *NEWSDAY*, April 21, 1997, at A22; Dan Barry, *Charges of Brutality: the Overview*, *N.Y. TIMES*, Aug. 15, 1997, at A1; Fred Kaplan, *NYC Police Accused of Pattern of Brutality*, *BOSTON GLOBE*, June 27, 1996, at 8; Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?*, *L.A. TIMES*, Feb. 11, 1996, at M1. Chin and Wells wrote a comprehensive compendium of articles on like subjects. See Chin & Wells, *supra* note 7, at 234-44 nn.2-27.

11. See generally N.Y.C. COMM'N ON HUMAN RIGHTS, *BREAKING THE US VS. THEM BARRIER: A REP. ON POLICE COMMUNITY RELATIONS* (1993); MOLLEN COMM'N REP., *supra* note 7; WARREN CHRISTOPHER, *REP. OF THE INDEP. COMM'N ON THE L.A. POLICE DEP'T* (1991) [hereinafter CHRISTOPHER COMM'N REP.]; WHITMAN KNAPP, *REP. OF THE COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROC.* (1972) [hereinafter KNAPP COMM'N REP.]; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *TASK FORCE REP.: THE POLICE* (1967); HEARING HELD AT THE U.S. CT. HOUSE, FOLEY SQUARE, N.Y., MARCH 14, 1951 BEFORE THE SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE (1951); REP. OF SPECIAL INVESTIGATION BY THE DIST. ATT'Y OF KINGS CO. AND THE DEC. 1949 GRAND JURY; FINAL REP. OF SAMUEL SEABURY, REFEREE IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATE'S COURTS IN THE FIRST JUDICIAL DEP'T AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS AT LAW PRACTICING IN SAID COURTS (1932); NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT (1931); CHARENCE LEXOW, *REP. OF THE SPECIAL COMM. OF THE BD. OF ALDERMEN OF THE CITY OF N.Y. TO INVESTIGATE THE POLICE DEP'T* (1913); REP., SPECIAL COMM. APPOINTED TO INVESTIGATE THE POLICE DEP'T OF THE CITY OF N.Y. (1895); but see CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, *CRIMINAL JUSTICE IN CRISIS: A REP. TO THE AM. PEOPLE AND THE AM. BAR ON CRIMINAL JUSTICE IN THE U.S.: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE* (1988) [hereinafter *CRIM. JUSTICE IN CRISIS*] (finding that police dishonesty, perjury, and the judicial acceptance of such corrupt practices are not widespread phenomena); Honorable Harold Baer, Jr., *The Mollen Commission and Beyond*, 40 N.Y.L. SCH. L. REV. 5, 5-6 (1995) (stating that police corruption scandals occur in predictable, "twenty year cycles"); Richard J. Condon, *Police Corruption and the Need for Oversight*, 40 N.Y.L. SCH. L. REV. 55, 55 (1995) (describing the nature of the corruption cycles pre-Knapp Commission).

12. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. IV.

13. See e.g., Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in*

most recent scholarship and cases on point, there has been a fierce controversy on how the procedural requirements placed on police conduct encourage police lying and duplicity in order to tailor the facts to these legal requisites.¹⁵ Specifically, scholars, judges, pundits, and law enforcement professionals argue back and forth on whether or not the exclusion of illegally obtained evidence actually deters police misconduct, or rather encourages police perjury and “scamming,” while rewarding undeserving criminal offenders.¹⁶

This essay proposes a wider scope for a somewhat timeworn discussion—specifically, that police mendacity and the need to deter this form of police misconduct go to the very heart of our criminal justice

State and Federal Courts, 43 MINN. L. REV. 1083 (1959); Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968) (setting forth a study that “dropsy” testimony— police testimony that a suspect had dropped drugs in plain view of the arresting officer— was much more prevalent after the High Court’s holding in *Mapp v. Ohio*, 367 U.S. 643 (1961), which first interposed the exclusionary rule in state search and seizure cases). In Barlow’s article, the author opined that police witnesses were committing perjury to tailor the facts to avoid evidentiary exclusion. *See id.* *See also* Younger, *supra* note 8 (describing the dropsy phenomena from the bench in New York City’s criminal courts); Orfield, *supra* note 4, at 97; Fred Cohen, *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363, 367 (1972) (describing patterns of police perjury).

14. 367 U.S. 643 (1961) (holding that all evidence obtained unconstitutionally is inadmissible in state court).

15. *See, e.g.*, Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 52-53 (1994); Robert P. Burns, *Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843 (1995); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Donald A. Dripps, *Police, Plus Perjury Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996); Cloud, *supra* note 1; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

16. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 347 (1974) (defining the purpose of excluding illegally obtained evidence from trial as to deter future police misconduct). *But see* *United States v. Leon*, 468 U.S. 897, 911-913 (1984) (stating that the costs of excluding inculpatory proof outweighs the deterrent value when police officers reasonably rely on defective warrant papers); *see generally* Slobogin, *supra* note 7; AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1-45 (1997); JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 35-65 (1996); Jerome Skolnick, *Deception by Police*, 1 CRIM. JUST. ETHICS, 40, 43 (1982) (saying the officer “lies because he is skeptical of a system that suppresses truth in the interest of the criminal”); McNamara, *supra* note 10, at M1 (reporting that former police chiefs in both Kansas city and San Jose have “come to believe that hundreds of thousands of law enforcement officers commit felony perjury every year testifying about drug arrests”).

system and the need for trust in government and its processes,¹⁷ of which search and seizure law and practice is *only a small part*. Being only a part of a much larger systemic and societal problem, tinkering with search and seizure law and process alone will not heighten the police witness' respect for the oath.¹⁸

Police officers can be expected to omit, redact, and even lie on their police reports, sworn or unsworn;¹⁹ they will conceal or misrepresent to cover up corruption²⁰ and brutality;²¹ they are trained to deceive citizens during investigations as part of good police practice;²² they will obscure

17. See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE, 26-27 (1978) ("Trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse."). Morgan Cloud states the need for trust in police officers:

As the only representatives of the criminal justice system that most citizens see in everyday life, police officers serve important symbolic functions, and the entire society suffers if their behavior violates the rule of law. In a more concrete dimension, police officers are the agents of the state licensed to use force—deadly force if necessary—to implement the law's constraints upon our behavior. They are often the most important government actors in the process of deciding who will remain free and who will not. It is appropriate that we demand that the members of our democracy who possess this kind of power obey the system of laws that creates their power.

Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1354-55 (1996).

18. See Dripps, *supra* note 15, at 693 ("Police perjury, if accepted, can defeat any constitutional rule. Thus, the debates about stop-and-frisk, automobile searches, and police interrogation have a scholastic quality; no matter what rule appellate courts adopt, police may circumvent that rule by persuading trial courts to accept an incorrect account of the facts.").

19. See generally Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (giving examples of garden variety "reportilying"). James Lardner gave colorful examples of reportilying. See JAMES LARDNER, CRUSADER: THE HELL-RAISING POLICE CAREER OF DETECTIVE DAVID DURK (1996). One describes a patrolman who apprehended a burglar and was instructed by the Sergeant to place the Sergeant at the scene of the arrest in patrolman's paperwork; "put me in at the collar," officers would instruct subordinates. *Id.* at 31. Another discussed a police officer who rigged police paperwork in order to sabotage prosecution of a gambler who had been paying off the Department's Plainclothes Division. See *id.* at 107. A final example was the Special Investigations Unit detectives who were paid up to \$50,000 to destroy the records of an unauthorized wiretap and sabotage the case against defendants in Narcotics cases. See *id.* at 144.

20. See generally, KNAPP COMM'N REP., *supra* note 11; LARDNER, *supra* note 19; ALLAN KORNBLUM, THE MORAL HAZARDS: POLICE STRATEGIES FOR HONESTY AND ETHICAL BEHAVIOR 15-46 (1967) (containing a particularly detailed discussion of police deception and dishonesty in the enforcement of N.Y.'s gambling laws).

21. See generally PAUL G. CHEVIGNY, POLICE ABUSES IN NEW YORK CITY (1969); see also CHRISTOPHER COMM'N REP., *supra* note 11, at 168; MOLLEN COMM'N REP., *supra* note 7, at 53-58; David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 481 (1992); Joel Berger, *See-No-Evil Officers Should Pay*, N.Y. TIMES, Aug. 24, 1997, at 13.

22. See generally Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28

facts, and even lie, to cover up the misconduct of fellow officers.²³ Additionally, command practice and policy gives officers every incentive to lie to cover for lack of productivity or to aggrandize themselves for recognition and promotion.²⁴ And yes, police officers will commit perjury in our courts of law.²⁵

However, lies under oath, while often involving the tailoring of testimony to meet constitutional requirements, run a much wider gamut. For instance, perjury will occur to avoid criminal conviction or civil liability when the police officer is the accused.²⁶ Police will commit perjury to further the prosecution of a citizen by adding inculpatory "evidence" to better secure a conviction,²⁷ to gild the lily of police conduct,²⁸ or merely to sanitize the record of uncomfortable facts.²⁹ Put most broadly, as long as a police officer's use of power and fulfillment of responsibilities is reviewed (whether by courts, government agencies or supervisors), and as long as such reviews are deemed by the officer as creating legal impediments to more immediate goals, he will have an incentive to lie.³⁰

None of the incentives and pressures for police officers to lie can be properly distinguished from the reasons many other citizens have to falsify. Police stand here in the august company of politicians, professionals, public

CONN. L. REV. 425 (1996); Skolnick, *supra* note 16; YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS (1980).

23. See Chin & Wells, *supra* note 7 (discussing the effects of the "blue wall of silence" in covering up police misconduct).

24. See Fisher, *supra* note 19, at 12-14.

25. See, e.g., MOLLEN COMM'N REP., *supra* note 7, at 36; see also Orfield, *supra* note 4, at 1049-50; JONATHAN RUBINSTEIN, CITY POLICE 386-88 (1973).

26. See generally CHEVIGNY, *supra* note 21; Chin & Wells, *supra* note 7, at 277-79; Joseph Berger, *A False Report: Racial Issues and Officers Lose Their Jobs*, N.Y. TIMES Apr. 24, 1993 at 1, 26.

27. See Fisher, *supra* note 19, at 2-3 (describing police reports in *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), that were filled with falsehoods in order to make a stronger case against a suspect).

28. See LARDNER, *supra* note 19, at 31; KORNBLUM, *supra* note 20, at 80 (describing the practice of "flaking"—officers planting contraband on suspects to make high arrest quotas).

29. See Fisher, *supra* note 19, at 8-9 (explaining that police will reportily by excising exculpatory facts which might expose the officer to civil liability for false arrest or embarrassment for bad policing); see generally CHEVIGNY, *supra* note 21 (defining "cover charges" as false charges of disorderly conduct or resisting arrest or assault in order to cover for the injuries suffered by the defendant at the hands of the police).

30. See Skolnick, *supra* note 16, at 42 ("[P]erjury represents a subcultural norm rather than an individual aberration"); *id.* at 43 ("The policeman lies because lying becomes a routine way of managing legal impediments—whether to protect fellow officers or to compensate for what he views as limitations the courts have placed on his capacity to deal with criminals.").

figures, business executives and other persons of power and responsibility, all of whom have strong incentives to conceal uncomfortable circumstances, inflate favorable ones, and invent if necessary where no such happy facts exist.³¹

What distinguishes police officers is their unique power—to use force, to summarily deprive a citizen of freedom, to even use deadly force, if necessary—and their commensurately unique responsibilities—to be the living embodiment of the “law” in our communities, as applied fairly to every member.³² History, both in our country³³ and elsewhere,³⁴ teaches us that the powers to use force and to arrest are ones we must watch closely, even jealously. We know all too well the record of terrible abuse. We also know that the responsibility of public officials to represent fair and equal treatment is a bedrock of public trust, from which we derive the necessary confidence to live peaceably in a complex society.³⁵

All that said, eliminating the exclusionary rule for illegally obtained evidence³⁶ or changing the manner in which we hold suppression hear-

31. It is instructive here to compare the travails of President Clinton, who has admitted to misleading statements and testimony in the Paula Jones sexual harassment case, and the situation of the lying police officer in a garden variety criminal case. Both the President and the officer rationalize deception by adherence to a skeptical view both of the system and of the opposition. Both their statements are the products of extreme partisanship.

For example, President Clinton believed that both the Independent Counsel's office and the Jones attorneys were corrupt and politically motivated, entitling him to make less than candid statements in deposition testimony, in the Grand Jury, and to the American public. President Clinton believed that both the Independent Counsel and the Jones attorneys were using allegations of sexual impropriety against him to drive him from office and further a right-wing political agenda.

The lying police officer believes that the laws of search and seizure and the internal regulations and administration of police conduct are unreasonable and decidedly wrong-headed, the product of a liberal political and social agenda. He believes with certainty that the defendant he has arrested is a criminal deserving conviction and punishment, whose defense (whether procedural or substantive) is, by definition, corrupt. That is, the defense posture of a criminal is necessarily an attempt to escape proper punishment, and is therefore, by definition, immoral. The officer's contempt for the system that (in his mind) unreasonably impedes law enforcement and wrongheadedly protects the criminal, and his greater contempt for the defendant seeking to foil justice by mounting a defense, justifies his deception. In the officer's mind, the lie serves a greater good.

32. See Cloud, *supra* note 17, at 1354-55.

33. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 152-55, 360-63 (1993); JEROME K. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 23-88 (1993).

34. See generally MAURICE PUNCH, CONDUCT UNBECOMING (1985); CLIFFORD D. SHEARING, ORGANIZATIONAL POLICE DEVIANCE (1981); PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS (1995).

35. See BOK, *supra* note 17, at 26-27.

36. See Slobogin, *supra* note 7, at 1057-59; see generally Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982); AMAR, *supra*

ings,³⁷ would be largely ineffectual in combating the problem of police dishonesty.³⁸ The Fourth Amendment isn't a tool to combat police perjury, but rather targets unconstitutional conduct.³⁹

Moreover, the Fourth Amendment can't be a comprehensive tool to combat perjury when lying under oath in search and seizure hearings is just a smaller subset of the greater category of police falsification. The scope of the problem of police dishonesty, its causes, and our attempts to remedy it far exceed the compass of the Fourth Amendment.⁴⁰

On the other hand, we do have tools available to fight (or at least reveal) lying in the courtroom, and some of the casual falsehoods that lead up to it. These tools are familiar ones to trial lawyers and trial judges—constitutionally compelled, statutorily required, and judicially ordered discovery;⁴¹ a real opportunity for thorough cross-examination;⁴² and the

note 16; ROTHWAX, *supra* note 16.

37. See Cloud, *supra* note 1, at 1344-48 (proposing to expand the warrant requirement to all nonexigent searches and seizures while narrowing the exigency exception); Dripps, *supra* note 15, at 703-16 (proposing to admit polygraph evidence of both the testifying police officer and the defendant to help determine witness credibility in a suppression hearing); Slobogin, *supra* note 7, at 1055-57 (proposing to "flexify" probable cause by making it a more "common sense" judgment which incorporates the experience of the police officer); see also Christopher Slobogin, *The World Without a Fourth Amendment*, 39 U.C.L.A. L. REV. 1, 29-33 (1991) (proposing to make the suspicion requirements for police intrusion proportional to the level of intrusion being challenged); AMAR, *supra* note 16, at 31-45 (proposing to detach the court's determination of the "constitutional reasonableness" of a search or seizure from the warrant requirement or the probable cause standard).

38. See Stuntz, *supra* note 15, at 919 (asserting that warrant requirements do not prevent police perjury, but rather keep after-the-fact results from influencing judges). Dripps also expressed reservations about procedural solutions:

Police willing to lie can lie not only about exigent circumstances but also about consent and abandonment. 'Objective facts' depend on what testimony is believed at the suppression hearing [I]n the end, I am skeptical about letting the procedural tail wag the substantive dog. At the least we should artificially interpret the [C]onstitution to protect its true meanings from police perjury only as a last resort, with reluctance and regret.

Dripps, *supra* note 15, at 702.

39. See *United States v. Hawkins*, 811 F.2d 210, 215 (3rd Cir. 1987).

40. See generally Skolnick, *supra* note 16.

41. The Federal Constitution provides a basis for ordered discovery under the Due Process Clause. See *Brady v. Maryland*, 373 U.S. 83 (1963) (explaining that the prosecutor has duty to disclose exculpatory evidence to the defense, i.e., evidence "material either to guilt or punishment"); *United States v. Bagley*, 473 U.S. 667 (1985) (describing *Brady* evidence as "material" if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). State constitutions can also provide for protection under due process. See, e.g., *People v. Vilardi*, 555 N.E.2d 915 (1990) (adopting more protective *Agurs* standard of materiality—whether there was reasonable possibility that nondisclosure "contributed to the verdict") (referring to *United States v. Agurs*, 427 U.S. 97 (1976)). The Federal Rules of Criminal Procedure set the scope of statutorily mandated discovery. See FED. R. CRIM. P. 16; FED. R. CRIM. P. 26.2. For discretionary

elevation of the issue of witness credibility to the prominence it truly deserves.⁴³ In other words, upon a sufficient offer of proof, criminal court judges should permit full-dress litigation of police credibility. Judges should encourage a much deeper exploration of the issue of police credibility than presently occurs in our criminal courts.

In that connection, Part II of this article analyzes first the functional, political, procedural, and doctrinal reasons why criminal court judges do not now weigh police witness credibility seriously. Part III sets forth different scholarly approaches from the literature to the problem of police mendacity and various proposed institutional and legal reforms to address

disclosure, see the Rule 7 provisions regarding a Bill of Particulars. *See* FED. R. CRIM. P. 7. *Compare* FED. R. CRIM. P. 16 and FED. R. CRIM. P. 26.2 with N.Y. CRIM. PROC. 200.95 (McKinney 1993) (providing an example of state criminal procedure law and providing that upon defense request, state must provide a Bill of Particulars) and N.Y. CRIM. PROC. 240.20 (McKinney 1993) (requiring that upon defense demand, the State must produce and make available various documents, property, photos, etc.). There is inherent judicial authority to extend discovery beyond that which is authorized by the Federal Rules. *See* *United States v. Carrigan*, 804 F.2d 599 (10th Cir. 1986) (giving the court inherent authority to order government witnesses to submit to defense depositions as a sanction for government misconduct); *see also* *United State v. Stubblefield*, 325 F. Supp. 485 (E.D. Tenn. 1971); *compare id.*, with N.Y. CRIM. PROC. 240.40 (1)(c) (McKinney 1993) (providing that upon defense motion, a court may in its discretion order discovery of any property which the defendant can show is material to the preparation of his defense).

42. The right of confrontation is guaranteed by the Sixth Amendment of the Federal Constitution, providing the accused's right to the opportunity of cross-examination of witnesses in criminal proceedings: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST., amend. VI. Similarly worded confrontation clauses in state constitutions and bills of rights have also been held to guarantee cross-examination of witnesses. *See e.g.*, N.Y. CIV. RIGHTS § 12 (McKinney 1992).

The Federal Rules of Evidence under Rule 611(b) contemplates cross examination of witnesses on "matters affecting the credibility of the witness." FED. R. EVID. 611(b). Judges have substantial discretion regarding the proper scope of such cross-examination. In addition, Rule 801(c) defines hearsay as inadmissible out-of-court statements offered to "prove the truth of the matter asserted," thus not precluding out-of-court statements offered in cross-examination to challenge a witness' credibility (e.g., prior inconsistent statements; statements tending to prove bias, hostility or self-interest; proof of prior bad acts or crimes relevant to the witness' credibility). FED. R. EVID. 801(c). Thus, hearsay and the limits of the hearsay exclusion permit cross-examination of witnesses so long as out-of-court statements and proof introduced bear on the witness' believability and reliability.

43. *See generally* H. Richard Uviller, *Credence, Character and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776 (1993). Uviller describes an adversary trial as

a structured process for the determination of the credibility of strangers, many of whom will, for one reason or another, try to deceive those who rely upon their word. Our faith in the adversary system—still a significant element in the determination of guilt—depends in large measure on our confidence that, assisted by courtroom procedure, our jurors will usually return a verdict consistent with the historical fact.

Id.

it. In that section, the strengths, flaws, and practical limitations of each of these proposals are explored. Lastly, Part IV of this article sets forth a judicial approach (if not a solution) to the problem of police lying. It explores familiar evidentiary and procedural means by which judges can provide a fuller hearing of the issue of police witness credibility. By these means, criminal trials conducted under accepted rules of evidence and process can reveal the lie and (perhaps) deter it.

Judges who have been giving the wink and nod to questionable police testimony, who have been working with an improper (and frankly illegal) presumption in favor of police witness credibility,⁴⁴ must change both practice and perspective. One of the strongest reasons that police lie in court is the simple fact that judges allow them to get away with it. The wink and the nod conveys many messages—either that the judge is politically hamstrung and so cannot afford to confront the lie;⁴⁵ or that the judge defers to the police witness, knowing that confronting the lie aids the defense;⁴⁶ or most disturbingly, that the judge actually approves of the lie. In any event, nothing less than an utter change in judicial conduct and point of view, free of political pressure to be “tough on crime,” will result in the most effective deterrent to police lying.

Surely, other changes in the government’s approach to police misconduct need to be effected as well—better monitoring of departmental performance by civilian agencies;⁴⁷ upgraded hiring practices, training, internal monitoring;⁴⁸ and so on—but such reforms are beyond the scope of this article. Nevertheless, as part of a larger legal and institutional

44. See Cloud, *supra* note 1, at 1339-40.

45. See Cloud, *supra* note 17, at 1347-50; John Q. Barrett, *The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHNS J.L. COMMENT. 1 (1996). Cloud and Barrett discuss *United States v. Bayless [I]*, 913 F. Supp. 232 (S.D.N.Y. 1996), a case where Federal District Court Judge Harold Baer, Jr. suppressed 80 pounds of narcotics discovered in the trunk of the defendant’s car based in part on the judge’s discrediting of police witness testimony, and *United States v. Bayless [II]*, 921 F. Supp. 211 (S.D.N.Y. 1996), where after months of political fallout and calls for the Judge’s impeachment, Judge Baer re-opened the suppression hearing and reversed his prior ruling, denying the defense’s motion to suppress while now accrediting the police testimony. See Cloud, *supra* note 17, at 1346-50; Barrett, *supra* note 45.

46. See Cloud, *supra* note 1, at 1321-24.

47. See MOLLEN COMM’N REP., *supra* note 7, at 152; see generally Annette Gordon-Reed, *Watching the Protectors: Independent Oversight of Municipal Law Enforcement Agencies*, 40 N.Y.L. SCH. L. REV. 87 (1995); Peter F. Vallone, *The City Council’s View of Independent Oversight of the Police Department*, 40 N.Y.L. SCH. L. REV. 13 (1995); Paul A. Crotty, *The Corporation Counsel’s View of Independent Oversight of the Police Department*, 40 N.Y.L. SCH. L. REV. 23 (1995); Richard J. Condon, *Police Corruption and the Need For Oversight*, 40 N.Y.L. SCH. L. REV. 55 (1995).

48. See William J. Bratton, *Fighting Police Corruption as Crime Itself*, 40 N.Y.L. SCH. L. REV. 35 (1995); SKOLNICK & FYFE, *supra* note 33, at 172-266.

reformation, the judiciary can begin to change its own practice of giving a wide berth to police dishonesty as a first step in solving a fundamental problem in our justice system and police culture. The judiciary can stop winking and nodding, and instead subject police witnesses to the same tests of proof that other witnesses are subjected to when they swear to tell the truth.

II. The Judicial Weighing of Police Credibility

A. *The Diminished Seriousness of Weighing Witness Credibility*

Despite the historical and jurisprudential separation of the roles of judge and jury—the judge as the arbiter of the law and the jury as the arbiter of the facts⁴⁹—the judge in criminal cases is often called upon to be a factfinder. A mere sampling of the occasions when a criminal court judge must determine and weigh facts includes: when a judge rules on the credibility and sufficiency of evidence presented at a preliminary hearing,⁵⁰ when a judge must make an evidentiary ruling (often during trial) regarding the credibility and admissibility of evidence based on a offer of proof,⁵¹ when a judge must determine both relevance and degree of probativeness when expanding (or limiting) the scope of discovery (or when deciding on whether to sign a subpoena or compel testimony),⁵²

49. See *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (providing one of the earliest formulations of this division). Justice Story, presiding at trial as a Circuit Justice, instructed the Massachusetts jury:

It is the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.

Id. at 1043.

50. See *Thies v. State*, 189 N.W. 539, 541 (1922). In *Thies*, the court states:

The object or purpose of the preliminary [hearing] is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

Id.

51. See FED. R. EVID. 103(a)(2); FED. R. EVID. 103(c).

52. See FED. R. CRIM. P. 16 (concerning discovery and inspection); FED. R. CRIM. PROC. 17 (subpoena); 18 U.S.C. 6003 (compulsion of testimony by grant of immunity). Compare *id.*, with N.Y. CRIM. PROC. § 240 (McKinney 2000) (discovery); N.Y. CRIM. PROC. § 610 (McKinney 2000) (subpoena); N.Y. CRIM. PROC. § 50 (McKinney 2000) (compulsion of evidence by offer of immunity).

when a judge must decide whether or not sufficient credible evidence has been presented to require a judicial instruction to the jury,⁵³ when a judge determines whether sufficient facts have been presented to support a criminal information or a true bill of indictment,⁵⁴ when a judge entertains an application for bail conditions and thus must review (among other considerations) the strength of the prosecution's case and the strength of the defense,⁵⁵ and of course when a judge is the ultimate finder of fact during a bench trial.⁵⁶

For a factfinder in any legal posture, the issue of credibility—the believability and reliability of testimonial evidence—is absolutely paramount. A factfinder must:

scrutinize the testimony given and the circumstances under which each witness has testified [c]onsider each witness' intelligence, his motives, state of mind, his demeanor and manner while on the witness stand All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.⁵⁷

There is nothing stated expressly in the law that this enterprise of scrutinizing testimony is any less important for a judge than for a jury. However, the legal posture in which criminal court judges normally find facts serve to relieve judges from taking the weighing of witness credibility as seriously as would otherwise be indicated. First of all, judges (unlike juries) know that determinations of credibility are reviewed on appeal only for an abuse of discretion.⁵⁸ The crediting or discrediting of testimony is almost never "clear error."⁵⁹ To that extent, judges do not experience the same fear of committing reversible error when weighing the accuracy

53. For instance, see the evidentiary standard set forth in *People v. Taylor*, 80 N.Y.2d 1 (1992) (stating the court must initially determine that a reasonable view of the evidence supports a finding of a defense before such defense may be submitted by instruction to the jury).

54. See FED. R. CRIM. P. 12(b)(2) (contemplating pre-trial motions to dismiss a defective indictment or information); compare *id.* with N.Y. CRIM. PROC. § 170.50(1)(a) (McKinney 1993) (providing a more detailed provision than the federal rules and providing that the prosecutor's information may be dismissed if evidence was legally insufficient to support the charge) and N.Y. CRIM. PROC. § 210.30 (McKinney 1993) (allowing the indictment to be dismissed or charges reduced if evidence before the grand jury was legally insufficient).

55. See 18 U.S.C. 3142(g) (listing factors the court must consider when ordering terms for bail); compare *id.*, with N.Y. CRIM. PROC. § 510.30(2) (McKinney 1995).

56. See FED. R. CRIM. P. 23 (allowing trials before the court when the defendant waives the right to a jury trial); compare *id.*, with N.Y. CRIM. PROC. § 350.20 (McKinney 1994).

57. *Hoffa v. United States*, 385 U.S. 293, 312 n.14 (1966).

58. See *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1975).

59. See *id.* at 575.

and believability of testimony, as opposed to when making the correct ruling on a matter of law.

In addition, judges in criminal cases are cast in the role of factfinders during pre-trial suppression hearings. The standard of proof in a hearing regarding probable cause to search or the potential taint of an identification procedure is the civil standard of a "preponderance of credible evidence," rather than the standard for criminal trials of "beyond a reasonable doubt."⁶⁰ Therefore, even if a question of credibility is raised during a pre-trial suppression hearing, the prosecution must show only that its version of the facts is more likely than not, a standard that invites, at most, mild judicial scrutiny.⁶¹ If the prosecution's burden at a pre-trial hearing was to prove the credibility of its witnesses beyond a reasonable doubt in order to prove probable cause to search, no doubt the judge-as-factfinder would feel constrained to scrutinize the witness' reliability more carefully.

This relaxation of the rules of witness credibility for fact-finding judges applies not only during suppression hearings, but in other kinds of evidentiary rulings as well. For instance, error may not be predicated upon a ruling which admits or excludes any evidence unless a substantial right of the party is effected.⁶² Appellate courts have come to interpret this to mean that "garden variety" evidentiary rulings are (presumptively) non-reviewable or at worst harmless error.⁶³ Certainly, evidentiary rulings based on preliminary factfinding and the weighing of witness credibility (again, subject only to an "abuse of discretion" standard of review) are de facto non-reviewable.

Lastly, a judge is particularly free to weigh testimony and its legal significance when presiding at a bench trial, that is, when the judge serves

60. *United States v. Matlock*, 415 U.S. 164, 177 (1974).

61. The most telling case on point is *People v. McMurtry*, 314 N.Y.S.2d 194 (Crim. Ct. 1970). In that case, Judge Irving Younger discussed the problem of constitutionally tailored testimony particularly in narcotics cases. *See id.* Judge Younger described what is termed "dropsy" testimony, where police witnesses allege that the defendant dropped narcotics on the floor or sidewalk in plain view of the arresting officer, affording the officer probable cause to arrest. *See id.* at 197. The court determined that "'dropsy' testimony should be scrutinized with especial caution." *Id.* Judge Younger reasoned: "When there are grounds for believing that the 'guardians of its security' sometimes give deliberately false testimony, it is no 'dismal reflection on society' for judges to acknowledge what all can see." *Id.*

Ironically, Judge Younger did not suppress the evidence in the *McMurtry* case, finding that the officer's testimony did not appear to be false, nor was there any contradiction from other witness' testimony. *See id.* at 198. Accordingly, Judge Younger relied on whether the civil standard of proof had been met, judging that the movant (defendant) did not prevail because in a case where the testimony was evenly balanced, the prosecution wins. *See id.* The point of diminished seriousness could not be better illustrated.

62. *See* FED. R. EVID. 103(a).

63. *See, e.g., United States v. Traylor*, 656 F.2d 1326 (9th Cir. 1981); *see also* FED. R. CRIM. P. 52 (regarding harmless error, i.e., when defect "does not affect substantial rights").

as both the arbiter of the law and the facts.⁶⁴ Police officers often waive their right to a jury trial and opt for a bench trial when they themselves are charged as defendants (for example, in brutality cases or corruption cases), in part because they assume that a judge, more than a jury of citizens, will sympathize with them as defendants and believe them as witnesses. This sympathy for police defendants and police witnesses can result in “judge nullification,” and an undeserved acquittal for the police officer/defendant.⁶⁵ Most significantly, a judge’s judgment of acquittal, like a jury’s, is non-reviewable.⁶⁶

Thus, given the legal posture of the criminal court judge as factfinder, the review of witness credibility becomes a matter of *diminished seriousness*. What this author means by diminished seriousness is that a judge who is bound by clear rules of law (or specific factors to consider), subject to appellate review, is a judge held to a standard of serious review. To the extent that a judge is given something approaching unfettered discretion, largely unreviewable by an appellate court (for example, to the degree that no ruling on witness credibility can be clear error), is the extent to which the system expresses its lack of serious concern over the entire issue.

B. The Further Diminished Seriousness of Weighing Police Witness Testimony

As an institutional and political matter, this lack of scrutiny of witness credibility by judges-as-factfinders is compounded when the witness involved is a police officer. In criminal cases, much evidence is premised on police testimony. In pre-trial suppression hearings in particular, evidence is comprised largely of police accounts, specifically the police officer or informant who hears of or observes facts that would constitute grounds for police intrusion or seizure, the police officer who actually commits the intrusion or the seizure, the interrogating police officer, or the officer who witnesses a defendant’s statement, or the police officer who witnesses or conducts an identification procedure. In cases of searches or arrests pursuant to a warrant, there may be additional witnesses, including the officer who heard certain information from an informant and the officer who actually authored the warrant affidavit.⁶⁷

64. See *supra* note 56.

65. See Rob Yale, *Note: Searching For the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1846-48 (1997) (finding that courts are loath to impose criminal sanctions on police since they are professionals with their own standards and rules that judges will not second-guess); Cf. SKOLNICK & FYFE, *supra* note 33, at 195-99.

66. See *Sanabria v. United States*, 437 U.S. 54 (1978) (stating that the double jeopardy clause does not distinguish between jury and non-jury trials).

67. See *People v. Hetrick*, 80 N.Y.2d 344 (1992); *Franks v. Delaware*, 438 U.S. 154

Sometimes the relevant testimony comes from one police witness. Other times, particularly when team investigative activity (such as, narcotics "buy-and-busts") are involved, testimony will come from a large number of police witnesses, for example, an observing officer, an arresting officer, an undercover officer, a supervising officer, an officer assigned to seize and voucher evidence, and so forth.⁶⁸

When a judge suppresses evidence because of a constitutional violation by the police, there are a number of consequences. The primary one is that inculpatory proof is excluded from the trial.⁶⁹ In some cases, this will require the dismissal of some if not all charges against the defendant.⁷⁰ In those same cases, this will entitle an otherwise guilty defendant to go free or face a sharply reduced sentence, if convicted.

As a consequence of such suppression, the judge is necessarily ruling on the conduct of the police officers, on their credibility at times and on the performance and competence of the prosecution. A trial judge or appellate court can couch this ruling in any number of ways—that the police conduct was an intentional if not flagrant violation of criminal procedure of a constitutional dimension⁷¹ or that the police testimony describing such conduct was unworthy of belief.⁷² However, a scathing

(1978).

68. For a helpful description of a buy-and-bust operation, see JEROME H. SKOLNICK & DAVID BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* 172-75 (1986).

69. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained unconstitutionally is inadmissible in state court via the incorporation of the Fourth Amendment into the Due Process Clause of the Fourteenth Amendment); see also *Weeks v. United States*, 232 U.S. 383 (1914) (finding that in a federal prosecution, the Fourth Amendment bars evidence obtained via an illegal search and seizure).

70. See Justice Cardozo's famous opinion in *People v. Defore*, 150 N.E. 585 (1926) (stating that under the exclusionary doctrine of the New York State Constitution, "[t]he criminal is to go free because the constable has blundered").

71. For instance, the Supreme Court in *McDonald v. United States*, 335 U.S. 451 (1948) held that a warrantless search of a rooming house was constitutionally invalid. See *id.* at 454-55. The police officers' intentional breach of the warrant requirement (i.e., they had been previously denied a warrant) was deemed outrageous: "[p]ower is a heady thing; and history shows that police acting on their own cannot be trusted." *Id.* at 456. *Harris* also provides an example. *People v. Harris*, 532 N.E.2d 1229 (1988), *rev'd*, 495 U.S. 14 (1990), *on remand*, 570 N.E.2d 1051 (1991). With respect to the purpose and flagrancy of the unlawful entry, the New York State Court of Appeals found that the police had probable cause to arrest for five days, but deliberately chose not to obtain a warrant. See *id.* at 1233. Accordingly, admission of the defendant's statement made after the unlawful entry would encourage violations of the warrant requirement and a routine departmental policy to forego arrest warrants. See *id.* at 1233-35.

72. See, e.g., *People v. Heath*, 214 A.2d 519, 520-21 (N.Y. App. Div. 1995) (stating that police "testimony that he observed defendant exchanging a 2-inch glass vial with a dark top, from a distance of approximately 74 feet, from a moving patrol car, after dark, is, in our view, contrary to common experience and, as such, was incredible as a matter of law and did not

opinion impugning the motives, honesty, or competency of police is rarely found in trial court opinions.⁷³ More likely, a trial judge even when finding against the prosecution, will characterize the police conduct as a negligent, if not merely technical, violation that the judge is constrained to find in breach.⁷⁴ Sometimes the trial judge will rule in the most neutral manner of all—merely that the prosecution has failed to sustain its burden to prove that the police conduct was constitutional.

However, it should be no surprise that the criminal court judge will much more likely find for the prosecution in a suppression hearing and admit the state's evidence.⁷⁵ That strong tendency to find in favor of the

support the verdict"); *United States v. Mitchell*, 83 F. Supp. 1073, 1079 (N.D. Miss. 1993) (finding that a police officer's testimony that he could "plainly feel" crack cocaine contained in six plastic bags, wrapped in a sock which was contained in a brown paper bag carried in the pocket of a leather jacket was not credible, i.e., determination of narcotics contraband was not "within the realm of human capability with a single pass of one's hand over the outer clothing"). Cf. Judge Lance Ito's finding that L.A.P.D. investigators demonstrated a "reckless disregard for the truth" in a warrant application to search the house of O.J. Simpson, but the court nevertheless did not suppress any evidence obtained therein. For helpful discussion, see Slobogin, *supra* note 7, at 1037-38.

73. *But see* *United States v. Bayless (I)*, 913 F.Supp. 232 (S.D.N.Y. 1996) (showing the exception that proves the rule). In *Bayless (I)*, the court states:

. . . Officer Carroll's testimony is at best suspect . . . the defendant's version of the events . . . is likely to be a more accurate statement of what occurred that morning than an officer's testimony offered more than eight months after the events took place. And where, one may wonder was the officer in charge, Sergeant Bentley? While presumably available to corroborate this officer's gossamer, he was never called to testify . . .

. . . . If we credit the defendant's statement, and I do, one cannot keep from finding Carroll's story incredible.

Id. at 239-40. For support of his deep skepticism of police testimony and conduct, Judge Baer also cited to the federal prosecution of police officers in the same neighborhood of Washington Heights for perjury and false statements regarding arrests, and referred to the Mollen Commission report regarding police brutality and misconduct. *See id.* at 242. The public and political response to this deeply skeptical opinion regarding police credibility was unprecedented and Judge Baer subsequently reversed himself in *United States v. Bayless (II)*, 921 F.Supp. 211 (S.D.N.Y. 1996). *See also* Cloud, *supra* note 45, at 1347-50 & n.31 (discussing other recent federal cases where district court judges did not accredit police testimony).

74. In part, this formulation of police "negligence" or technical breach is a result of the constitutional doctrine that search and seizure violations turn on "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Scott v. United States*, 436 U.S. 128, 136 (1978). In other words, if the only proper legal inquiry is what a reasonable officer would have done, there is no need for the court to delve into issues of bad faith. Given that opportunity not to call the officer to task for his breach, the court will opt for more neutral, less accusatory language. Cloud provides excellent discussions of the objective test in search and seizure cases and its relationship to police perjury and misconduct. *See* Cloud, *supra* note 1; Cloud, *supra* note 72.

75. *See* Cloud, *supra* note 1, at 1321.

police conduct under review includes, as a matter of course, the strong tendency to accredit police testimony. As already discussed, there are evidentiary and procedural reasons why a judge's review of any witness' testimony during a suppression hearing is a less serious enterprise.

Professor Cloud has listed five additional reasons why the judge's review of police witness credibility is bound to be less scrutinizing during pre-trial suppression hearings.⁷⁶ Specifically, "[j]udges accept perjured testimony from police officers" regarding search and seizure⁷⁷ because (1) "it can be very difficult to determine whether a witness is lying," especially if the judge works under the principle that police officers are presumptively trustworthy;⁷⁸ additionally, police officers are often "experienced witnesses" who can frame their narratives to "conform to constitutional requirements;"⁷⁹ (2) "judges dislike excluding probative evidence;"⁸⁰ (3) judges are often predisposed to believe that the defendant is guilty;⁸¹ (4) assuming a swearing contest between the defendant and the police officer, judges are likely to disbelieve the defendant;⁸² and finally, (5) judges do not like to call police officers liars.⁸³ Professor Cloud's list is not exhaustive. Another reason for judges' noncritical acceptance of police testimony is many judges' specific distaste for the exclusionary rule as it applies in a criminal procedure context. This is a refinement of Professor Cloud's reasons (2) and (3) as set forth above. A judge who may have no problem excluding proof under other evidentiary rules (for example, hearsay, cumulativeness, inflammatory nature of the evidence, more prejudicial effect than probative value, among others) may have a big problem with the exclusionary rule under the Fourth, Fifth, and Sixth Amendments specifically because exclusion by definition aids the defense, and more specifically rewards guilty defendants.⁸⁴

The last two reasons why judges will casually accredit police testimony may be the most pernicious of all and the most corrosive of the rule of law. First, many judges accept without question the reality of urban policing as depicted by the police and their public advocates. Such an accepting attitude tends to relax judicial scrutiny on all issues of police honesty. The criminal procedure law permits police deceit in numerous contexts, and police training and standard practice encourages it. For

76. See Cloud, *supra* note 1, at 1321-24.

77. *Id.* at 1321.

78. *Id.*

79. *Id.* at 1321-22.

80. *Id.* at 1322.

81. See *id.* at 1323.

82. See *id.*

83. See *id.* at 1323-24.

84. See, e.g., ROTHWAX, *supra* note 16, at 35-65.

instance, standard police practice includes lying during the interrogation of witnesses,⁸⁵ performing searches and seizures for pretextual reasons,⁸⁶ and conducting various kinds of undercover operations,⁸⁷ all of which require deception and falsification. Much of this is popularly described and accepted as the “reality of the street.” It is the way police conduct their business in our communities every day, and they make no apologies for it.

Accordingly, judges may believe that police officers work in a grey zone of morality. Such judges are less likely to be sticklers on proper police conduct, and are thereby less likely to thoroughly scrutinize police testimony describing such conduct. Of course, such a belief and practice places these judges in a similarly grey moral (if not legal) universe.⁸⁸

The last and perhaps the most reprehensible reason for the knee-jerk accreditation of police testimony is rankly political. Particularly in high publicity cases and major offenses (but not exclusively so), judges don’t want to be seen as “soft on crime.” Whether elected or appointed, state court judges in particular are subject to significant pressures from the press, the public, and from the political powers that be. There is nothing worse for a judge, ever mindful of the political future, than having her picture and name on the front page of a city tabloid, with the headline decrying a pro-defendant ruling. Even life-tenured federal judges—presumably insulated from such political pressure—are not above such concerns.⁸⁹

85. See Young, *supra* note 22; KAMISAR, *supra* note 22; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIMINAL JUSTICE ETHICS 3 (1992).

86. See, e.g., *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *United States v. Robinson*, 414 U.S. 218 (1973).

87. See Skolnick, *supra* note 16.

88. See Young, *supra* note 22, at 456 (“Courts treat police lying as a ‘necessary evil,’ yet they rarely articulate why they conclude it to be either necessary or evil.”) (citations omitted). Professor Young then cites to cases that expressly seek to justify the deception. See *id.* at 456 n.185. (“In one case permitting police lying that the murder weapon had been found, the court favorably cited the detective’s testimony that ‘the way to get police work done is to do it ‘the best way you can.’”) (quoting *Moore v. Hopper*, 389 F. Supp. 931, 935 (M.D. Ga. 1974)); see also *Commonwealth v. Cressinger*, 44 A. 433, 433 (Pa. 1899) (“Society and the criminal are at war, and capture by surprise, or ambush, or masked battery, is as permissible in one case as in the other.”).

Cf. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (arguing that the current “reasonableness” inquiry into police practices by the court is in fact a “minimum rational basis” test that necessarily defers to police judgments of what is right and what is wrong). See, e.g., *United States v. Ross*, 456 U.S. 798 (1982) (holding that a warrantless search of a sealed container found during a search of a car was valid). “When a legitimate search is under way . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.” *Id.* at 821. (footnote omitted).

89. See, e.g., *United States v. Bayless (I)*, 913 F. Supp. 232 (S.D.N.Y. 1996); *United*

It is significant, regarding the scope of the problem of honesty, that most of the above listed reasons why police testimony gets a free (or discounted) pass from judges apply whenever a judge is a factfinder, and not just during search-and-seizure hearings. A trial judge's unwillingness to discredit police testimony, the presumption of both the defendant's guilt and unreliability as a witness, the adoption of the police officer's grey zone moral perspective, and the political pressures to side with the prosecution, apply whenever a criminal court judge finds facts. Thus, the judiciary's unspoken presumption in favor of police witness credibility, much like the problem of police lying itself, is of a much greater dimension and effect than as found in the pre-trial litigation of probable cause or the reading of *Miranda*⁹⁰ rights.

III. Other Scholarly Approaches to Police Lying

A. *Professor Skolnick: Institutional Reform and the Elevation of the Prosecutorial Role and Duty*

Over the last many years, a number of scholars have suggested ways to inhibit police dishonesty, particularly focussing on the incidence of police witness perjury. For instance, Professor Jerome Skolnick suggests that prosecutors take a more active role in preventing police deception and other misconduct.⁹¹ He proposes that prosecutors can best explain to police officers the constitutional requirements placed on police conduct, and the necessity that police follow the rules in spite of their personal disagreement with the Supreme Court's restrictions on their official discretion.⁹²

Professor Skolnick and his co-author James Fyfe also propose structural changes in police departments themselves, specifically advocating community-policing reforms that emphasize crime prevention rather than arrest quotas.⁹³ With less emphasis on statistical "production," police officers would be less likely to make the marginal or bogus "collars" to meet the numerical allotment required by command. Presumably, with fewer improper or questionable arrests, there would be fewer occasions for

States v. Bayless (II), 921 F. Supp. 211 (S.D.N.Y. 1996).

90. *Miranda v. Arizona*, 384 U.S. 436 (1966).

91. JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 203 (2d ed. 1975).

92. *Id.*

93. See SKOLNICK & FYFE, *supra* note 33, at 237-66.

perjury (or other obstruction of justice) to sustain an otherwise illegal police act.⁹⁴

Again, the scope and emphasis of this article is judicial reform, not institutional and political change. However, Skolnick and Fyfe's institutional proposals, though laudable, only address a portion of the problem of police dishonesty—the false arrest and the constitutional tailoring of testimony.

Whereas false arrest is a significant problem, dishonesty in the form of cover charges⁹⁵ and added falsifications to increase the likelihood of conviction⁹⁶ are probably as prevalent. In plainer terms, Professor Skolnick's proposal to de-emphasize arrest quotas would no doubt address the "drug sweep," where every person on a particular block at 2:00 A.M. is arrested for drug offenses, irrespective of evidence of guilt.⁹⁷ Without an arrest quota, there would be little incentive for sweep arrests of this description. However, Professor Skolnick's proposals would not address the problem where, for example, a facilitator (that is, a "steerer") or a person arrested in mere possession of a small amount of narcotics is charged with the more serious crime of narcotics sale.⁹⁸ These sorts of falsehoods aren't made to comply with quota requirements—"overcharging" occurs because of more fundamental incentives and constraints inherent to policing and police culture.⁹⁹

For example, police officers will "overcharge" a case to aggrandize themselves, to anticipate the inevitable reduction of charges during plea-bargaining, or as an essentially adversarial act against a person the police officer presumes is guilty of the more serious crime, despite a lack of sufficient evidence.¹⁰⁰

94. See *id.* at 189-90; see also Fisher, *supra* note 19, at 14 (discussing the internal lies necessary to comply with arrest quotas and other forms of production).

95. See CHEVIGNY, *supra* note 21.

96. See Fisher, *supra* note 19, at 16-17; UVILLER, *supra* note 8, at 116-18.

97. See CHEVIGNY, *supra* note 21, at 222-28 (describing what the author calls "dragnet arrests": "Officers . . . take people whom they believe to be users of narcotics out of buildings and off the streets . . . [A] citizen is likely to be arrested any time he is found in circumstances even suggesting a connection with contraband").

98. For instance, New York Penal Law § 220.03, Criminal possession of a controlled substance in the seventh degree (i.e., simple possession), is prosecuted as a misdemeanor, see N.Y. PENAL LAW § 220.03 (McKinney 2000), as is Penal Law § 115.00, Criminal facilitation in the fourth degree (i.e., simple facilitation), see N.Y. PENAL LAW § 115.00 (McKinney, 1998). On the other hand, Penal Law § 220.39, Criminal sale of a controlled substance in the third degree (sale of any quantity of narcotics), is prosecuted as a B felony, see N.Y. PENAL LAW § 220.39 (McKinney 2000), which carries a maximum sentence of twenty-five years, see N.Y. PENAL LAW § 70.00 (McKinney 1998).

99. See Fisher, *supra* note 19, at 16-17.

100. *Id.*

Police officers will also invent cover charges when a suspect is injured during apprehension or while in custody. In order for the officer to defend against a potential claim of excessive force, he will attest that the injuries were a result of the defendant's assault on the officer or on the defendant's having resisted apprehension.¹⁰¹ Again, the prevalence of cover charges would not be effected by the elimination of arrest quotas.

Regarding the placing of responsibility on the prosecutor to explain to the police the requisites of lawful policing, such a proposal suggests a certain naivete both about prosecutors and about police attitudes towards prosecutors. Studies and anecdotal accounts have indicated prosecutorial nonchalance towards police perjury, particularly in regards to the tailoring of police testimony in pre-trial suppression hearings.¹⁰² Prosecutors often have the same antipathy to the legal requisites of search and seizure doctrine as do the police. Who is there to educate and monitor the prosecutors? More generally, a prosecutor may be at least as invested in the conviction of a defendant as the arresting police officer.¹⁰³ Prosecutors suffer under similar political constraints and pressures as judges. Though they may not have quotas, they are evaluated—either by supervisors or by the public—based on the number and the quality of their convictions.¹⁰⁴

Prosecutors also are constrained by their ongoing relationship with the police.¹⁰⁵ They rely on police effort, cooperation, and good will for the quality of their cases.¹⁰⁶ Maintenance of such a close, dependent relationship requires both tolerance and tact—tolerance of police misconduct (so long as it is not too outrageous and therefore impossible to ignore)¹⁰⁷ and timidity in confronting police officers with anything that might seem accusatory or blunt.¹⁰⁸ Prosecutors must always assure police officers that they are on the officers' side. The prosecutor who is too demanding of police officers, too judgmental, too "by the book" is often despised.¹⁰⁹

101. See generally CHEVIGNY, *supra* note 21.

102. See Orfield, *supra* note 2, at 109-12; MOLLEN COMM'N REP., *supra* note 7, at 42; cf. UVILLER, *supra* note 8, at 115-18.

103. See generally Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Network*, 15 AM. J. CRIM. LAW 197 (1988).

104. See *id.* at 205-06.

105. See *id.* at 209 n.59.

106. See Chin & Wells, *supra* note 7, at 263-64.

107. See Rosenbaum, *supra* note 2, at 809; see also Orfield, Jr., *supra*, note 2 at 110; Slobogin, *supra* note 7, at 1047.

108. See Younger, *supra* note 8, at 596 ("The policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven"); see also Orfield, *supra* note 2, at 109-12.

109. See generally McIntyre, *Impediments to Effective Police Prosecutor Relationships*, 13 AM. CRIM. L. REV. 201 (1975).

The consequence of being despised by the police is that the prosecutor gets very little cooperation. All of these aspects of the prosecutorial role and the relationship between prosecutors and police officers makes the prosecutor a questionable choice for the role of monitoring and deterring police officer dishonesty.

B. The "Fourth Amendmentists: "Getting Rid of the Incentive to Lie

Other scholars and pundits diagnose police dishonesty (and other pathologies) as largely a result of the constitutional rules of engagement as applied on the street.¹¹⁰ The constitutional law of search and seizure and the exclusion of evidence in courtrooms—in other words, modern Fourth Amendment jurisprudence—dictate the very nature of citizen-police encounters. These critics generally contend that search and seizure doctrine is unreasonable and impractical, while the remedy of evidentiary exclusion is both unreasonable and unjust.¹¹¹ Police officers resent this injustice and impracticability and react accordingly.

On the street, they argue, police officers have to be able to respond to situations in the flow of events, rather than according to received doctrine.¹¹² Professional intuitions and educated suspicions about criminality should be given credence, not discounted merely because some quantum of probable cause cannot be easily articulated.¹¹³ For example, Professor Slobogin emphasizes that probable cause is a common sense concept, that it should reflect the experience level of the individual police officer making the judgment, and that the quantum of suspicion required for police action should vary depending on the level of intrusion involved. He names this proportionality principle, operating between suspicion and intrusion, the flexifying of probable cause.¹¹⁴

Professor Slobogin recognizes that this proportionality calculus affords "extra discretion" to the police officer.¹¹⁵ However, such flexifying should diminish the officer's incentive to lie about probable cause because Professor Slobogin's regime would allow the testifying

110. See, e.g., Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1287-88 (1996); see generally CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993); ROTHWAX, *supra* note 16, at 35-65.

111. See Bradley & Hoffman, *supra* note 110, at 1287-88; BRADLEY, *supra* note 110; ROTHWAX, *supra* note 16, at 35-65.

112. See Slobogin, *supra* note 7, at 1056; Slobogin, *supra* note 37, at 68-75.

113. See Slobogin, *supra* note 7, at 1056-57.

114. See *id.* at 1055-57.

115. *Id.* at 1057.

officer to describe the basis for his suspicions, hunches and provisional conclusions without worrying that his judgment did not perfectly coincide with rigid doctrine. The officer's judgment would be deemed reasonable so long as it was proportional to the level of intrusion.¹¹⁶

Of course, Professor Slobogin's flexifying of probable cause has already taken place to a large extent, by the court's elastic analysis of what constitutes a seizure, what constitutes an arrest, and what police acts require probable cause in the first place. The court already holds the view that, in essence: "the [F]ourth [A]mendment does not prohibit intrusive actions that an individual officer reasonably believes necessary to enforce the law. Put another way, the Court will not second-guess police action that advances law enforcement interests so long as the conduct is not shocking."¹¹⁷

The court's view of a common sense standard already sounds like Professor Slobogin's call for flexibility: the court weighs "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion."¹¹⁸ In that regard, a police chase,¹¹⁹ a police seizure to pat down for weapons,¹²⁰ a car stop,¹²¹ a detention for purposes of inquiry,¹²² none of these seizures are deemed arrests, and therefore none of these require probable cause to justify the intrusion. Instead, each seizure is justified by important governmental interests. With such a free floating doctrine of deference to law enforcement interests, particularly regarding intrusions deemed short of an arrest, the flexifying of probable cause becomes doctrinal surplusage.

Professor Amar comes to some similar conclusions about searches and seizures to Professor Slobogin, though premised more on an originalist interpretation of the Fourth Amendment text itself and colonial history.¹²³

116. *Id.*

117. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

118. *United States v. Hensley*, 469 U.S. 221, 228 (1985).

119. *See, e.g., People v. De Bour*, 352 N.E.2d 562 (1976) (stating that the police may forcibly pursue and/or stop an individual based on a reasonable suspicion that a crime has been committed).

120. *See Terry v. Ohio*, 392 U.S. 1 (1968) (holding that police officer with reasonable fear for safety may "conduct a carefully limited search" for weapons).

121. *See Adams v. Williams*, 407 U.S. 143 (1972) (stating that evidence from informant was sufficient to justify a limited search of the driver of the car for a weapon).

122. *See De Bour*, 352 N.E.2d at 572 (saying a police officer is entitled to a "common law right of inquiry," whereby he may interfere with a citizen to the extent necessary to gain explanatory information).

123. *See AMAR, supra* note 16, at 1-45. There is some substantial dispute with Professor Amar concerning both textual and historical readings of the Fourth Amendment. *See* Morgan Cloud, *Searching Through History; Searching For History*, 63 U. CHI. L. REV. 1707, 1730-31 (1996) (using William John Cuddihy's history of the Fourth Amendment to demonstrate errors

He is less concerned about police honesty. Professor Amar argues, as a textual matter, that the probable cause requirement in the Fourth Amendment refers only to the issuance of warrants (that no warrant shall issue without probable cause).¹²⁴ However, warrantless searches need only be reasonable—they do not require probable cause as a matter of original intent.¹²⁵ Professor Amar contends that not only is this a proper reading of the constitutional text, but that it is a common sense understanding as well. Clearly, many searches and seizures are not and can not be subject to a probable cause requirement—for example, consent searches,¹²⁶ plain views,¹²⁷ metal detectors at airports,¹²⁸ building code and other administrative inspections,¹²⁹ *Terry*-stop pat downs,¹³⁰ prison searches,¹³¹ and grand jury subpoenas.¹³²

In addition, probable cause (even when applicable) must not be a rigid concept. Justification for searches and seizures must calculate the imminence of harm, the intrusiveness of the search, the reason for the search, and so forth.¹³³ As a consequence, Professor Amar invokes a rule of reasonableness for all police/citizen encounters that looks strikingly like Professor Slobogin's proportionality calculus, although with an

in Amar's "originalist" interpretations); Donald Dripps, *Akhil Amar On Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559 (1996) (arguing that Amar's errors include a neglect of 14th Amendment incorporation of the Bill of Rights, Due Process, and of the history of Supreme Court jurisprudence over the last 80 years); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 856 (1994) (questioning Amar's original intent analysis as not properly accounting for post-colonial developments in modern policing and inter-racial conflict since the Civil War, both of which support warrant and probable cause preferences plus the exclusionary rule); cf. Maclin, *supra* note 91 (arguing that a "reasonableness" test for the Fourth Amendment is a rubber-stamp "minimum rational basis" test).

124. See AMAR, *supra* note 16, at 17-20.

125. See *id.* at 31-40.

126. See, e.g., *United States v. Matlock*, 415 U.S. 164 (1974) (allowing third party consent for a search).

127. See *Arizona v. Hicks*, 480 U.S. 321 (1987) (stating that probable cause is not required when the seizure is minimally intrusive).

128. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 (1989).

129. See *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967).

130. See *Terry v. Ohio*, 392 U.S. 1 (1968).

131. See *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that the Fourth Amendment does not require probable cause to search a prison cell).

132. See *United States v. Dionisio*, 410 U.S. 1 (1973) (saying that a summons to appeal at a grand jury trial does not violate any right protected by the Fourth Amendment and thus there is no requirement of reasonableness). Amar, in *The Constitution and Criminal Procedure: First Principles*, discusses additional searches and seizures which are not subject to a probable cause requirement. See AMAR, *supra* note 16, at 18.

133. See generally AMAR, *supra* note 16, at 31-40.

expanded list of relevant factors in the mix¹³⁴ resulting in a “sliding scale[] of reasonableness.”¹³⁵

Additionally, both Professors Slobogin and Amar (and others) argue that inculpatory evidence should not be precluded from trial just because a police officer has overstepped legal bounds (“flexified” or not, reasonable or not). The just remedy for a constitutional infirmity cannot be an undeserved reward to a guilty defendant.¹³⁶ Additionally, Professor Amar argues that there is nothing in the original intent of the Fourth Amendment which contemplates evidentiary exclusion. He claims, instead, that original intent contemplates a claim for damages before a civil jury to remedy unreasonable police activity.¹³⁷

Most importantly for this discussion, many of these Fourth Amendmentist critics argue that unreasonable or inflexible rules of police/citizen engagement combined with the threatened sanction of evidentiary exclusion forces police officers to choose between 1) compliance with inefficient and impracticable procedures that run counter to effective law enforcement, and 2) disregard of such procedures in order to be more effective, and then testilying about it subsequently, to avoid evidentiary exclusion.¹³⁸ Professor Uviller describes this sort of tailored police testimony to avoid evidentiary exclusion most benignly as an “instrumental adjustment[,] . . . [a] slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result.”¹³⁹

Because of his particular scholarly focus, Professor Amar is more concerned that the threat of evidentiary exclusion forces judges to distort doctrine in order to avoid exclusion. Judges (like police officers) generally dislike the exclusionary rule. The resulting distorted doctrine literally becomes a web of contemptible technicalities that alienates the citizenry from its own Constitution and interpretive institutions.¹⁴⁰ No doubt, Professor Amar would argue that it alienates law enforcement (as part of the citizenry) as well from the very rules it is mandated to follow.

134. *Id.* at 37-39 (noting that the racial impact of police practices should weigh in the balance of reasonableness).

135. Steiker, *supra* note 123, at 856 n.196 (internal quotation marks omitted).

136. *See, e.g.,* Bradley & Hoffmann, *supra* note 110; *see generally* BRADLEY, *supra* note 110; ROTHWAX, *supra* note 16, at 35-65.

137. *See* AMAR, *supra* note 16, at 21-22; *see also* Ronald J. Bacigal, *Putting the People Back Into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994) (arguing for a return to jury trial determinations of Fourth Amendment violations).

138. *See* Slobogin, *supra* note 7, at 1044; *see generally* Skolnick, *supra* note 16; UVILLER, *supra* note 8.

139. UVILLER, *supra* note 8, at 115-16.

140. *See* AMAR, *supra* note 16, at 30.

Other critics of Fourth Amendment jurisprudence suggest similarly fundamental changes in search and seizure law—for example, instituting a good faith exception to both the warrant requirement and the probable cause requirement¹⁴¹—but most frequently, like Amar and Slobogin, eliminating the exclusionary rule altogether.¹⁴² They generally suggest, as does Professor Amar, a civil or administrative rewards-and-punishment system to remedy constitutional breaches by law enforcement.¹⁴³ Professor Slobogin advocates a liquidated damages remedy such as the one set forth by Professor Davidow.¹⁴⁴ Among other consequences of such reforms, they argue that many if not all the incentives for police officers to lie would be eliminated.¹⁴⁵

In addition, there have been less radical arguments for a partial limitation on exclusion based on a “comparative reprehensibility” approach: that “a court should balance the seriousness of the officer’s error against the gravity of the defendant’s crime and only exclude evidence when, if ever, the reprehensibility of the officer’s illegality is greater than the defendant’s.”¹⁴⁶ This approach has never captured very

141. This is based on the good faith exception as set forth in *United States v. Leon*, 468 U.S. 897 (1984) (holding that an officer may act in reasonable reliance on a facially valid search warrant, even if such warrant is ultimately found to be invalid), *Arizona v. Evans*, 514 U.S. 1 (1995) (stating that a computer error showing outstanding warrant could be reasonable relied upon), Justice White’s dissent in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1060 (1984) (White, J., dissenting) (arguing for a good faith exception in civil deportation proceedings), and in his dissent in *Stone v. Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting) (supporting the idea that the exclusionary rule should not apply when officers with a good faith belief that they were acting lawfully have a reasonable basis for that belief). Good faith exceptions to the warrant requirement and probable cause have been held elsewhere in the lower federal courts. See references in Thomas K. Clancy, *Extending the Good Faith Exception to the Fourth Amendment’s Exclusionary Rule to Warrantless Seizures That Serve as a Basis for the Search Warrant*, 32 HOUS. L. REV. 697 (1995); see also William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L. J. 1361 (1981) (supporting police rulemaking to replace evidentiary exclusion with a good faith exception).

142. See, e.g., BRADFORD P. WILSON, *ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY* 122 (1986); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 495-9 (1955); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982) (suggesting fining a police officer whose conduct was inappropriate rather than applying the exclusionary rule); cf. ROTHWAX, *supra* note 16, at 35-65 (suggesting courts make exclusion discretionary).

143. See AMAR, *supra* note 16, at 21-22; see also Bacigal, *supra* note 137, at 359.

144. See Slobogin, *supra* note 7, at 158; Robert P. Davidow, *Criminal Procedure Ombudsman As A Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973); Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982).

145. See Slobogin, *supra* note 7, at 158; Davidow, *supra* note 144, at 317; Davidow, *supra* note 144, at 939.

146. Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment

much judicial and scholarly support. It has been most effectively rebutted by Professor Kamisar's argument that an exception to exclusion for evidence of murder, kidnapping, or rape would in essence amend the Fourth Amendment, creating no deterrent for unconstitutional police conduct in investigations of serious crimes.¹⁴⁷ More significantly, in regards to police lying, a doctrine of comparative reprehensibility might create a significant incentive for police officers to overcharge cases in order to free them up from constitutional strictures. Thus an unarmed robbery would be falsely characterized by the arresting officer as a suspected armed robbery, so as to interject the serious crimes exception to the exclusionary rule, thereby removing the deterrent effect of exclusion.

The fourth Amendmentists almost uniformly support their claim for the elimination of the exclusionary rule with the historical observation that police testilying only became a problem after *Mapp v. Ohio*,¹⁴⁸ and after that case was applied to the states allowing evidentiary exclusion to searches absent probable cause.¹⁴⁹ They argue that before that epochal decision, police officers in state prosecutions had no real reason to prevaricate on the stand since an improper search, even if proven, would not hamstring the prosecution while rewarding a guilty defendant.¹⁵⁰

Unfortunately, the fact that police testilying only became a problem after *Mapp* begs the question of whether police witnesses lied under oath before *Mapp*, but that such false testimony wasn't considered a problem (legal or otherwise) at that time. Certainly, many categories of police dishonesty pre-dated *Mapp*—cover charges,¹⁵¹ lies to hide corruption,¹⁵² lies to hide brutality,¹⁵³ false or trumped up charges to meet quotas,¹⁵⁴ deceptions as part of run-of-the-mill police investigation procedures,¹⁵⁵ among others. Almost none of the corruption and attendant lies and cover-ups revealed by the Knapp Commission report, the Prince of the City

Exclusionary Rule, 86 MICH L. REV. 1, 2-3 (1987). Kamisar describes a theory set forth by John Kaplan. See *id.* (referring to John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974)) (drawing on comments made by Judge Robert Bork in *United States v. Mount*, 757 F.2d 1315, 1323 (D.C. Cir. 1985)).

147. See Kamisar, *supra* note 146, at 46.

148. 367 U.S. 643 (1961).

149. See *id.*

150. See sources cited *supra* notes 13 & 15.

151. See CHEVIGNY, *supra* note 21, at 136-46.

152. See generally, KNAPP COMM'N REP., *supra* note 11; LARDNER, *supra* note 19; KORNBLUM, *supra* note 20, at 15-46.

153. See CHRISTOPHER COMM'N REP., *supra* note 11, at 68-70; MOLLEN COMM'N REP., *supra* note 7.

154. See Skolnick & Fyfe, *supra* note 33, at 189-90.

155. See generally Young, *supra* note 22; Skolnick, *supra* note 16; KAMISAR, *supra* note 22.

prosecutions, and before that, the Wickersham and Lexow reports,¹⁵⁶ had anything to do with testifying to meet constitutional requisites. Such revelations had everything to do with police culture and the norms that prevailed in that culture at those historical times, and still prevail to this day.

In addition, Fourth Amendment jurisprudence over the last thirty years or so has indeed flexified: it has sought to accommodate the varying degrees of police expertise, the need for discretion in law enforcement, the importance of officer safety, the inevitability of administrative law enforcement needs, the significance of good faith errors, and the different degrees of intrusion bearing some reasonable relation to the level of suspicion required to justify such intrusion. In other words, at least since *Terry v. Ohio*,¹⁵⁷ the courts have factored into the Fourth Amendment calculus more and more of the realities and concerns of law enforcement, to make the law of police/citizen encounters more reasonable (at least as far as the police are concerned). Yet there is no evidence that such judicial accommodation to the needs of law enforcement has reduced the amount of testifying or addressed the threat that police lying poses for the criminal justice system.

Lastly, eliminating evidentiary exclusion as a sanction for constitutional breaches is only supportable if another remedy is substituted in its place to effectively deter police misconduct. Here, Professor Carol Steiker's critique of civil or administrative approaches to police violations of constitutional safeguards is well taken:

Even if legislatures enacted the kind of comprehensive remedial scheme proposed by Professor Amar, the ultimate distribution of such remedies would lie largely in the hands of juries. Can we be confident that juries would award Fourth Amendment remedies sufficient to create litigation

156. See generally N.Y.C. COMM'N ON HUMAN RIGHTS, BREAKING THE US VS. THEM BARRIER: A REP. ON POLICE COMMUNITY RELATIONS (1993); MOLLEN COMM'N REP., *supra* note 7; CHRISTOPHER COMM'N REP., *supra* note 11; KNAPP COMM'N REP., *supra* note 11; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REP.: THE POLICE (1967); HEARING HELD AT THE U.S. CT. HOUSE, FOLEY SQUARE, N.Y., MARCH 14, 1951 BEFORE THE SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTER-STATE COMMERCE (1951); REP. OF SPECIAL INVESTIGATION BY THE DIST. ATT'Y OF KINGS CO. AND THE DEC. 1949 GRAND JURY; FINAL REP. OF SAMUEL SEABURY, REFEREE IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATE'S COURTS IN THE FIRST JUDICIAL DEP'T AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS AT LAW PRACTICING IN SAID COURTS (1932); NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT (1931); CHARENCE LEXOW, REP. OF THE SPECIAL COMM. OF THE BD. OF ALDERMEN OF THE CITY OF N.Y. TO INVESTIGATE THE POLICE DEP'T (1913); REP., SPECIAL COMM. APPOINTED TO INVESTIGATE THE POLICE DEP'T OF THE CITY OF N.Y. (1895); *but see* CRIM. JUSTICE IN CRISIS, *supra* note 11; Baer, *supra* note 11, at 5-6; Condon, *supra* note 11, at 55.

157. 392 U.S. 1 (1968).

incentives and thus to promote adequate deterrence?¹⁵⁸

After all, people charged with crimes are no more sympathetic to juries as civil plaintiffs than they are as criminal defendants.¹⁵⁹ Administrative regulation of police practices promises no greater return. "[E]ven when they face governmental liability for damages, administrators feel countervailing pressures to tolerate low-level misconduct [o]rganizational incentives may on balance outweigh the fiscal ones that governmental liability creates."¹⁶⁰

Lastly, an officer charged in a civil or administrative action with unconstitutional conduct, and facing suspension, dismissal, fines or damages, would have every incentive to lie in such a proceeding.¹⁶¹ In order to create a strong disincentive to police breaches of the Fourth Amendment, a civil or administrative process would have to promise strong medicine against the offender and the department—damages, fines, loss of privileges and even termination of the officer. Certainly, such sanctions would create at least as strong an incentive to testify as does evidentiary exclusion (perhaps more so, given the personal consequences for the police officer and the internal pressures from the departmental hierarchy).¹⁶²

And would prosecutors or judges be more vigilant about police testimony if evidentiary exclusion was no longer the remedy for unconstitutional conduct? Probably not, since many of the reasons why judges and prosecutors wink and nod at police lying would still apply—the presumption of credibility, the timidity in finding an officer a liar, the dependent relationship between prosecutor and law enforcement, the presumption of distrust which attaches to the criminal defendant, the relaxation of judicial scrutiny because police officers work in a grey moral universe, and the inevitable politicization of the process.

In sum, a doctrinal or procedural reconfiguring of search and seizure law, as advocated by the Fourth Amendmentists, would not have a comprehensive effect on the incidence of police lying. The flexifying of the Fourth Amendment in the courts has already occurred to a great extent over the last thirty years, with no demonstrable proof of a reduction in testilying. In addition, much police lying does not involve search and

158. Steiker, *supra* note 123, at 849.

159. See Dripps, *supra* note 123, at 1617 n.267 (citing Foote, *supra* note 142, at 504-507) (noting that a plaintiff's criminal record would be admissible at a civil trial for Fourth Amendment violations both to impeach and to mitigate damages).

160. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 125 (1983) (cited in Steiker, *supra* note 123, at 849 n.164).

161. See Orfield, *supra* note 2, at 126.

162. Cf. CRIMINAL JUSTICE IN CRISIS, *supra* note 11, at 20 ("[Police officers] are not eager to replace [the exclusionary rule] with different sanctions such as expanded civil remedies against the police officer or the department.").

seizure practices. Lastly, such emphasis on the Fourth Amendment does not properly consider the entirety of police culture, its norms and its discontents. The elimination of the exclusionary rule would provide no necessary reduction of police testilying either, so long as the substitute civil or administrative process would punish individual police misconduct and police departments. Police officers facing suspension or fines or departmental discipline would have every incentive to lie in order to avoid sanctions, just as they do now in avoiding exclusion.

C. *Evidentiary Approaches to Deterring Police Lying*

Professor Donald Dripps has proposed an intriguing but ultimately flawed evidentiary response to police lying.¹⁶³ He suggests that the court should authorize the administration of polygraph examinations of the defendant and the police witness, and admit the results into evidence at a pre-trial suppression hearing, particularly when there is a “swearing contest[]” between defense and prosecution witnesses.¹⁶⁴ Professor Dripps argues that polygraph evidence is reliable scientific proof that can pass muster under the prevailing rules of evidence, and help the judge, as finder of fact, to determine witness credibility.¹⁶⁵ It would serve as a tie-breaker, particularly when there is no other corroborating evidence.¹⁶⁶

The problems with Professor Dripps’ modest proposal are many, while its virtues are few. A threshold difficulty is the technology itself, which has yet to be widely adopted in criminal cases, and recently experienced a severe setback in the Supreme Court case *United States v. Scheffer*¹⁶⁷ (which came down after the publication of Professor Dripps’ article).

A second problem is the limited extent to which the technology would be used under Dripps’ proposed regime. Only uncorroborated police testimony contradicted by defense testimony in a hearing on unconstitutional police conduct would merit the introduction of the polygraph evidence. Practically speaking, defendants rarely testify in pre-trial suppression hearings, subjecting themselves to prosecutorial cross-examination on matters directly bearing on guilt.¹⁶⁸ It would be even more unlikely

163. See Dripps, *supra* note 15.

164. *Id.* at 693-94.

165. See *id.* at 702-16.

166. See *id.*

167. 523 U.S. 303 (1998) (holding that the Military Rule of Evidence precluding polygraph evidence is not a violation of defendant’s Due Process rights).

168. Cf. Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. AND MARY L. REV. 1 (1993) (describing the difficulties inherent in a defendant’s choice to testify, particularly given the court’s inclination to enhance the defendant’s sentence if the defendant takes the stand and the jury rejects his story).

(under Professor Dripps' proposal) for a cautious defense attorney to advise a client to testify at a pre-trial hearing followed by a polygraph examination where questions bearing directly on guilt and credibility would be asked and evaluated by a lie detector.

An additional limiting condition, is that the officer's testimony must be uncorroborated. This produces a troubling question for Professor Dripps—would the testimony of the arresting officer's partner suffice as corroboration, precluding use of the polygraph?¹⁶⁹ In that connection, Professor Dripps argues that the threat of a polygraph examination would create incentives for the police to corroborate by putting interrogations on videotape, for instance. On the contrary, polygraph evidence might create incentives for the police to manufacture corroboration so as to avoid the examination in the first place.

Lastly, Professor Dripps' argument only deals with a very small subset of police witness falsification, uncorroborated testimony in a pre-trial suppression hearing where the defendant testifies in direct contradiction. As discussed previously, police lying is a much more widespread and complex phenomena than Professor Dripps' analysis would otherwise indicate.

Professor Gabriel Chin and Scott Wells provide a much more promising evidentiary suggestion to confront police witness credibility.¹⁷⁰ They propose that courts permit impeachment of police testimony through proof of bias and motive to lie, and by using extrinsic evidence—specifically, the prevalence of the so-called blue wall of silence.¹⁷¹ This “unwritten code” of police silence “prohibits disclosing perjury or other misconduct by a fellow officer, or even testifying truthfully if the facts would implicate the conduct of a fellow officer.”¹⁷⁴ Professor Chin and Mr. Wells would permit examination of witnesses on the subject of the code of silence, extrinsic evidence testimony on the existence of the phenomenon, and a judicial instruction to the jury alerting them to the suspect nature of the challenged testimony.¹⁷⁵

No doubt, judges should permit such cross-examination and perfection of the impeachment with extrinsic proof of the existence of the blue wall of silence. However, as a practical and procedural matter, criminal trial

169. This question is critical, given the nature of the blue wall of solidarity that exists between brother officers, and the likelihood that more than one officer would be involved in any citizen/police encounter. For a helpful example of how corroboration of one officer's testimony by another officer's word tends to effect the trial court's determination of credibility, see *Bayless* (II). *United States v. Bayless* (II), 921 F. Supp. 211 (S.D.N.Y. 1996).

170. See Chin & Wells, *supra* note 7, at 237.

171. See *id.*

174. *Id.*

175. See *id.* at 272-99.

courts will not permit such examination and impeachment (much less a jury instruction) without a proffer that first convinces the court that the police witness may, in fact, be lying. In other words, only upon a showing of prior inconsistency,¹⁷⁶ contradiction,¹⁷⁷ actual bias or self-interest,¹⁷⁸ or a pattern of deception attaching to the prior conduct of the individual officer/witness proving the motive,¹⁷⁹ will the court permit such a theory of motive as sufficiently probative of the witness' bias.

Additionally, blue wall of silence impeachment and a related cautionary jury instruction would only apply in circumstances where the motive of the lie was demonstrably to protect a fellow officer.¹⁸⁰ Admittedly, it is not a fair criticism of the Chin and Wells proposal that it has insufficient scope, since they make no claim that blue wall impeachment would remedy all incidences of police witness falsification.¹⁸¹ However, it is worth noting how much police lying does not involve the code of silence per se, but rather the seemingly inevitable pressures, incentives, discontents, and professional expectations characteristic of policing.

Professor Chin and Mr. Wells use two cases, *United States v. Abel*¹⁸² and *Osborne v. City of Long Beach*¹⁸³ to show that membership of a witness in a group that shares a code of loyalty or silence is itself probative of bias.¹⁸⁴ However, both cases stand for something much less than the admissibility of blue wall of silence impeachment testimony in a case where the witness is not a party or an interested witness as a matter

176. See FED. R. EVID. 801(d)(1); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE (3d ed. 1984) § 34.

177. See MCCORMICK, *supra* note 176, at § 47.

178. See H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L. J. 776, 784-86 (1993) (discussing impeachment by bias).

179. See FED. R. EVID. 404(b).

180. See Chin & Wells, *supra* note 7, at 237 (stating the "unwritten code" of police silence "prohibits disclosing perjury or other misconduct by a fellow officer, or even testifying truthfully if the facts would implicate the conduct of a fellow officer").

181. See Chin & Wells, *supra* note 7, at 244 ("This proposal is consciously incremental and practical.").

182. 469 U.S. 45 (1984).

183. 865 F.2d 264, 1988 WL 141391 (9th Cir. 1988) (unpublished opinion).

184. See Chin & Wells, *supra* note 7, at 275-79.

of fact called by a party,¹⁸⁵ but merely the arresting officer in a garden variety criminal case.

In *Abel*, a defense witness was a member of the same secret prison gang as the defendant, and both the defendant and the witness were required by the gang's code of loyalty to deny the gang's existence, commit perjury, and even to commit murder to protect other members.¹⁸⁶ However, the government only introduced the code of loyalty in order to impeach the defense witness, a friend from the defendant's prison days, after he had testified that a primary government witness had admitted to framing the defendant in exchange for favorable government treatment.¹⁸⁷ In other words, a foundation had been laid for proof of bias by testimony of a defense witness who had a clear personal as well as associational relationship with the defendant. This proved that the defense witness was interested as a matter of fact in the acquittal of the defendant.¹⁸⁸ In addition, a swearing contest of sorts had occurred, placing the credibility of both the prosecution and defense witnesses at the very center of the case.¹⁸⁹ Lastly, the code of loyalty and silence of the "Aryan Brotherhood" gang was an essential and explicit associational feature of the gang itself (unlike the implicit blue wall of silence in police culture).¹⁹⁰

In *Osborne*, the Ninth Circuit Court of Appeals reversed and remanded a civil judgment in favor of several defendant Long Beach police officers, holding that the trial court erred in automatically precluding plaintiff's evidence of the blue wall of silence.¹⁹¹ The circuit court applied the *Abel* line of reasoning that "a witness and a party's common membership in an organization even without proof that the witness or party has personally adopted its tenets is certainly probative of bias."¹⁹² In *Osborne*, the plaintiff had sought blue wall testimony in a §1983 case involving excessive force to impeach a police witness/defendant whose sworn statement was inconsistent with arrest reports.¹⁹³

185. See *People v. Bowden*, 198 A.D.2d 39 (N.Y. App. Div. 1993) (defining a defendant who testifies as an interested witness as a matter of law; other witnesses may be interested as well, as a matter of fact); see generally discussion on "the Disposition to Lie Under Oath" in Uviller, *supra* note 178, at 813-15 ("In my view (to state it bluntly), nearly all people choose to lie on the witness stand according to two determinants: *the importance to them of having a falsehood believed* and their confidence that their false testimony will achieve that end with minimal risk.") (emphasis added).

186. See *Abel*, 469 U.S. at 47.

187. See *id.*

188. See *id.* at 467.

189. See *id.* at 466-67.

190. See *id.* at 466.

191. See *Osborne*, 865 F.2d 264, 1988 WL 141391 at *9 (unpublished opinion).

192. *Id.* at *4 (quoting *Abel*, 469 U.S. at 52).

193. See *id.* at *2-3.

In both *Abel* and *Osborne*, a clear foundation for extrinsic evidence to prove partiality has been laid. In both cases, proof of bias and motive dovetail with actual conflicts in the testimony: in *Abel*, a swearing contest between two witnesses,¹⁹⁴ while in *Osborne*, conflicting accounts between a witness and his prior written reports.¹⁹⁵ In the first case, the government clearly could demonstrate that the defense witness was an interested witness as a matter of fact;¹⁹⁶ in the second case, the witness was an interested witness as a matter of law.¹⁹⁷ Again, the extrinsic proof of bias and motive to lie neatly tied in with matters of testimony that (to some extent) "proved the lie."

However, without some proof of the lie itself, a motive to lie is not probative; at best, it is much more prejudicial than probative.¹⁹⁸ Particularly when the motive to lie comes from a generalized characterization of police culture, courts are going to want to see more than the defendant's offer of proof that such a code of silence exists, or even that it is prevalent, and that therefore this police witness is not credible.¹⁹⁹ In that sense, perfecting the impeachment by proof of motive to lie is the last step in the full-dress litigation of the credibility of a police witness. A foundation must first be laid, and that foundation can only be built on proof of prior inconsistency, contradiction, or some other challenge to the reliability of the police witness.

Chin and Wells touch on this reality when they cite to Judge Irving Younger's opinion in *People v. McMurdy*,²⁰⁰ but they do not realize its full import in that case. In *McMurdy*, the court determined that "[d]ropsy" testimony should be scrutinized with especial caution."²⁰¹ Dropsy testimony was inherently suspect because it was so likely to be false, so likely to be constitutionally tailored.²⁰² Yet in *McMurdy*, Judge Younger ultimately held that the prosecution had met its burden of proof to admit the evidence because the officer's testimony did not appear to be untruth-

194. See *Abel*, 469 U.S. at 466-67.

195. See *Osborne*, 865 F.2d 264, 1988 WL 141391, at *2-3.

196. See *Abel*, 469 U.S. at 466-67.

197. See *Osborne*, 865 F.2d 264, 1988 WL 141391, at *3.

198. Interestingly enough, the Ninth Circuit in *Osborne* remanded the case back to the trial court to determine whether the blue wall testimony was sufficiently probative to outweigh its prejudicial effect under FRE Rule 403. See *Osborne*, 865 F.2d 264, 1988 WL 141391, at *3.

199. Chin & Wells recognize this in their discussion of *Bush v. United States*, 375 F.2d 602 (D.C. Cir. 1967), where then Circuit Judge Warren Burger declined to offer a cautionary instruction regarding police witness testimony. See Chin & Wells, *supra* note 7, at 265.

200. See Chin & Wells, *supra* note 7, at 267-68 (citing *People v. McMurdy*, 314 N.Y.S.2d 194 (N.Y. City Crim. Ct. 1970)).

201. *McMurdy*, 314 N.Y.S.2d at 197.

202. See Chin & Wells, *supra* note 7, at 267-68.

ful, and there was no contradiction from other testimony.²⁰³ In other words, a trier-of-fact who was fully cognizant of the motive to lie and the prevalence of false dropsy testimony in the criminal courts of New York City²⁰⁴ did not assign much if any weight to that motive without some proof in the individual case before him of an actual lie.

Similarly, in *Maynard v. Sayles*²⁰⁵ (another case discussed by Chin and Wells²⁰⁶), an Eighth Circuit Court of Appeals panel held that the trial court should have permitted evidence of the blue wall of silence, but only after an adequate foundation of proof of police misconduct had already been established.²⁰⁷ *Maynard* was a civil case pled against Kansas City police officers who had been charged with excessive use of force.²⁰⁸ Clearly, since the gravamen of the civil complaint itself was police misconduct and police witnesses were necessarily interested witnesses,²⁰⁹ an adequate proffer of unreliability could be made as a prelude to impeachment using extrinsic evidence of motive.

In a criminal case, where the police officers are not parties (that is, they are not the accused), and where their misconduct is not the gravamen of the charge, the evidentiary bar will be set much higher. To expect trial courts to lower the bar to the admission of extrinsic evidence to prove motive is frankly unrealistic. A more attainable reform would be an expansion of discovery and cross-examination to show inconsistency, contradiction, and particularized proof of bias, prejudice, or self-interest. Once the court is shown proof of the lie, then the request for admission of extrinsic evidence to show motive will be a lot less attenuated.

In sum, the use Chin and Wells make of *Abel*,²¹⁰ *Osborne*,²¹¹ *McMurtry*,²¹² and *Maynard*,²¹³ though very helpful, begs the question as to how one can litigate police credibility to expose the lie, given the resistance of criminal trial judges in permitting adequate discovery and full-dress cross examination of police witnesses. Without an attorney's ability

203. See *McMurtry*, 314 N.Y.S.2d at 198.

204. See Younger, *supra* note 8, at 596-97 (discussing the prevalence of police perjury to meet constitutional requisites in an article in the *Nation* three years before *McMurtry*).

205. 817 F.2d 50 (8th Cir. 1987), *vacated en banc*, 831 F.2d 173 (8th Cir. 1987).

206. See Chin & Wells, *supra* note 7, at 270-72.

207. See *id.* at 53.

208. See *id.* at 51-52.

209. See *People v. Bowden*, 198 A.D.2d 39 (N.Y. App. Div. 1993); see generally *Uviller*, *supra* note 178, at 813-15.

210. *United States v. Abel*, 469 U.S. 45 (1984).

211. *Osborne v. City of Long Beach*, 865 F.2d 264, 1988 WL 141391 (9th Cir. 1988) (unpublished opinion).

212. *People v. McMurtry*, 314 N.Y.S.2d 194 (N.Y. City Crim. Ct. 1970).

213. *Maynard*, 817 F.2d at 50.

to show proof of the lie, extrinsic proof of the motive to lie will not be entertained.

IV. Judges Applying Enhanced Scrutiny and Permitting Expanded Discovery and Full Dress Cross Examination of Police Witnesses

A. *Impeachment by Omission*

Scholarship and studies have come to somewhat consistent conclusions: police officers will lie on police reports (for instance in overstating the evidence of an accused's guilt). More often than they lie affirmatively, police officers will omit facts from their reports.²¹⁴ There are any number of reasons why police officers both misrepresent and tactically omit facts on their reports, only some of which directly relate to the tailoring of testimony to meet constitutional requirements.²¹⁵ However, judges rarely see police reports in criminal cases until those cases reach the pre-trial hearing stage, or the trial itself. Therefore, the most direct effect that criminal court judges can have on the truthfulness of police reports lies in the manner in which those judges treat such reports at latter stages of litigation. A more scrutinizing approach to police reports by judges at hearings and trial could serve to deter the practices both of falsification and the strategic omission of facts from reports in the field.

The responsibility here necessarily falls on the shoulders of the criminal court judge. Civil court judges are limited in their ability to effect the format, use and preservation of police documents (and the training and supervision of officers regarding those documents) first, by the absence of *Brady* obligations on the police²¹⁶ and second, by the legal doctrine of separation of powers.²¹⁷ The civil courts have been loath to interfere

214. See Fisher, *supra* note 19, at 17-18, 26-31.

215. See Fisher, *supra* note 19, at 15-17.

216. See *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* doctrine has never been extended from the prosecutorial duty to disclose to a correlative duty for the police to preserve and disclose exculpatory evidence. In that connection, see *California v. Trombetta*, 467 U.S. 479 (1984) (involving the police's duty to preserve breath sample in a DWI prosecution) and *Arizona v. Youngblood*, 488 U.S. 51 (1988) (regarding police's duty to preserve sexual assault evidence kit containing blood and other samples). In both *Trombetta* and *Youngblood*, the court held that only a bad faith destruction of evidence by the police would have resulted in a Due Process violation. See *Trombetta*, 467 U.S. at 488; *Youngblood*, 488 U.S. at 58. The mere negligent loss of evidence in both cases were not deemed sufficient to reverse convictions on constitutional grounds. See *Trombetta*, 467 U.S. at 488; *Youngblood*, 488 U.S. at 58.

217. See e.g., *Palmer v. City of Chicago*, 755 F.2d 560, 573-78 (7th Cir. 1985) (holding that injunction against Chicago Police Department double-file investigation and reporting system was a too broad judicial intervention in what is a discretionary function). Fisher provides an

with the internal processes of police administration by enjoining the executive branch to change the manner in which police work is conducted, memorialized, and preserved. However, a cool reception to inadequate report writing in our criminal trial courts could have a powerful deterrent effect without requiring judicial meddling in executive and administrative matters.²¹⁸

A main function of a police report is to recite those basic facts obtained or observed which constitute probable cause to support an arrest.²¹⁹ To that extent, such reports—if inaccurate or misleading—will feed directly into perjurious testimony at a probable cause hearing and later at trial. Police reports are necessarily connected to the officer's testimony at a pre-trial suppression hearing or at trial. Such reports are discoverable to the defense, so that a failure by the officer to testify consistently with the facts recited in his reports provides a golden opportunity for defense impeachment based on prior inconsistent statements.²²⁰

Police reports will impact hearing and trial testimony as well, because such reports are often necessary to refresh the officer's recollection when testifying to the facts of the arrest (or the interrogation or the identification procedure).²²¹ Hearings and trials may take place many months after the events they concern. Officers may not remember the specific facts of a case or of an arrest, and they may require their reports to aid their memory.²²²

To that extent, police officers who lie on the stand to tailor the facts of the arrest to constitutional requisites, or who alter the facts to reflect false cover charges, or to reflect higher counts than the facts would otherwise justify, will generally have police reports that will allow them to do that.²²³ The reports will occasionally contain a false and detailed recitation of facts that neatly meets constitutional standards, a rendition which police witnesses will recite faithfully during testimony—tailored reports producing tailored testimony. More likely, however, the reports will have a minimal recitation of the facts, so skeletal that the report

excellent discussion on the limits of civil intervention in internal police practices. See Fisher, *supra* note 19, at 42-51.

218. See Fisher, *supra* note 19, at 51.

219. See Fisher, *supra* note 19, at 8.

220. See *id.* at 29-31; see also FED. R. EVID. 801(d)(1); MCCORMICK, *supra* note 176, at § 34.

221. See Fisher, *supra* note 19, at 32; see also FED. R. EVID. 612; MCCORMICK, *supra* note 176, at § 9.

222. See Fisher, *supra* note 19, at 32.

223. See *id.* at 30 (describing a "strategic approach to report-writing as a means to prevent embarrassment, civil liability, or loss of the prosecution's case").

permits the police officer to testify untruthfully, but not inconsistently with the report's bare-bones account of the case.²²⁴

The only potential problem the officer will have when testifying based on such a sketchy police report is convincing the factfinder that he has independent recollection of the events testified to. However, a reasonably well-prepared and experienced police witness will have no problem convincing the trial judge of the adequacy of his memory and the veracity of his story.²²⁵ First, as already stated, judges will tend to accredit police testimony as a matter of course. Second, defense attorneys attempt to impeach the police witness on grounds that the prior statement—the police report—is inconsistent with the officer's present testimony because the report does not contain many of the facts that, months later, the officer is recalling and swearing to on the stand.²²⁶ However, this "impeachment by omission" tack rarely persuades the judge-as-factfinder, precisely because such impeachment requires for its foundation that the material fact now testified to must be of such quality that it would have been naturally mentioned in the prior statement.²²⁷ In other words, only if the new fact *should* have been present in the police report does its omission have any impeachment value. Thus, a department-wide practice and policy to record minimal factual accounts in police reports can convince the judge that such factual detail, however material, would not naturally be mentioned in a police report, and therefore has little impeachment value against this particular police witness.²²⁸ As a consequence, a police department practice and policy of minimalist reporting to afford testifying officers the freedom to prevaricate on the stand also protects them from impeachment based on inconsistency.

224. *See id.* at 17.

225. *See* Cloud, *supra* note 1, at 1322. Cloud states:

Many officers become experienced witnesses. By virtue of their work they are likely to have testified many times, and to have refined and improved their techniques with practice. They are as comfortable in court as any witness who is likely to be subjected to vigorous cross-examination can be. As a result, their courtroom demeanor is likely to be good, and they are likely to tell stories bearing at least some indicia of substantive plausibility.

Id.

226. *See* MCCORMICK, *supra* note 176, at § 34 (discussing "impeachment by omission" and its proper foundation).

227. *See id.*

228. *See* Fisher, *supra* note 19, at 26-31 (describing forms and training materials from various police agencies). Professor Fisher concludes that police as a matter of policy and practice are trained to ignore exculpatory facts in their reports, to emphasize self-protection against civil liability, to use paraphrases and approximations in their documents in place of verbatim witness descriptions to deny defense opportunities to conduct cross-examination, and other means of minimalist reportilizing. *See id.*

Judges have great power in this connection, if they wish to use it. If police honesty in the courtroom is as serious a matter as commentators contend (and this author agrees), then judges must use that power. Since impeachment by omission requires as a foundation the establishment that a particular material fact should have naturally been present in the report, the court can and should reject a departmental policy or practice which redacts or omits material facts as being “not natural”—meaning not the expected (or proper) way a public official should write a report—regardless of local policy and practice. As part of its factfinding role, the court can choose not to accept the officer’s explanation that the absence of certain facts in a report is of no moment, that the officer was merely observing departmental policy to not record important facts in police reports, and factor that inconsistency into the determination of the witness’ reliability. If judges were more receptive to impeachment by omission in police documents, this would provide significant incentive to officers and the police hierarchy to change the practice of filling out skeletal reports.²²⁹

One might respond that such a change in judicial attitude and evidentiary approach to minimalist police reports would just give police officers more incentive to falsify details on police reports, rather than omit them. This author would argue, however, that wholecloth falsification would be a highly unlikely response to this change in judicial practice. Police gain information from only certain categories of sources—citizen witnesses, brother officers, radio transmissions, the suspect’s own words, and the officer’s own observations. Short of an organized conspiracy of falsification from the very start of an investigation,²³⁰ there are inherent checks on an officer’s ability to fabricate factual details from the start. These checks include the facts themselves and their sources as they develop. If the officer’s account of events recorded in reports generated shortly after an arrest differs from statements of other witnesses, other police reports from brother officers, recorded radio transmissions, defense investigations, and the like, such contradictions will have their own significant impeachment value later on at hearings and trial.²³¹ At the time when a police officer prepares documents shortly after arresting a suspect, he cannot be sure whether another set of facts, witnesses, or

229. Professor Fisher is more dubious of the judiciary’s ability on a case-by-case basis to effect the incidence of reportilying. *See* Fisher, *supra* note 19, at 50-51. He predicts that the courts would get tangled up in matters of materiality, prejudice, and police culpability regarding missing facts, then what sanctions to impose, and who would bear the ultimate burden of proof. *See id.* He is more hopeful regarding administrative changes. *See id.*

230. *See, e.g.,* JONATHAN RUBINSTEIN, CITY POLICE 43 (1973) (describing the drafting of false search warrants as a group enterprise).

231. Professor Fisher touches on this issue of the timing of reports and the potential for contradiction and impeachment. *See* Fisher, *supra* note 19, at 12.

reports will come to light, describing the same incident that he is misrepresenting in his report. In addition, if the police officer lies regarding his own observations or fabricates a suspect's inculpatory statements, without corroboration and without witnesses, his account will carry diminished weight. For instance, dropsy narratives, without corroboration, have become highly suspect.²³² Defendant's unsigned and untaped confessions, again without corroboration, are vulnerable as well.²³³ Proof of out-and-out falsification of police documents can cost an officer his job, his pension, and might subject him to both criminal prosecution²³⁴ and civil liability.²³⁵ Whereas a more vigilant judicial attitude regarding omissions on reports might stimulate some officers to falsify reports, the substantial costs suffered for more extensive falsification and the likelihood of getting caught would deter most officers so inclined.

B. Adverse Inferences for Omitted Facts

Judges can go further than just permitting impeachment by omission. Should the court find that a police report is absent of an important inculpatory fact that is now being magically recalled by the officer in his in-court testimony, the court can instruct a trial jury to consider (or consider in its own fact-finding) an adverse inference by virtue of that absence. The court could charge the jury (or consider in its own review) that the fact that a particular important inculpatory fact testified to by the police witness is not present in that officer's report—but should naturally have been present—permits the trier of fact to infer that if there had been a reference to the matter in that report, such documentary reference would have contradicted rather than supported his testimony.²³⁶ The adverse inference so instructed or considered, would create a significant deterrent to police testimony that strays significantly and materially from a bare-bones police report, and might deter such police reports in the first instance.

232. See KORNBLUM, *supra* note 20, at 80-81 (stating that N.Y.C. police have begun to use fictitious informants because of judicial mistrust of "dropsy" testimony).

233. See Young, *supra* note 22, at 462 n.207.

234. See Fisher, *supra* note 19, at 9 n.36.

235. See *id.* at 15.

236. A familiar example of an adverse inference instruction is the "missing witness" charge. A missing witness charge states that because of the failure of one side to call a witness whose testimony might have been favorable to that side, the jury may infer that such witness' testimony—if heard—would have been adverse to that side. See, e.g., *People v. Rodriguez*, 341 N.E.2d 231 (1975) (affirming a jury instruction that allowed the jury to consider the fact that the defendant failed to call his wife, who was a witness).

In addition, if the court should determine that an exculpatory fact known to the police witness was missing from a police report or from testimony, another adverse instruction could be considered or instructed. Prosecutors have *Brady*²³⁷ obligations, but police witnesses do not.²³⁸ An argument for extending *Brady* to the police as a due process right for criminal defendants is beyond the scope of this article.²³⁹ However, if the court should find that exculpatory facts were intentionally excised from reports or testimony, the court could consider that omission as demonstrating prima facie proof of adversariness, and therefore bias or self-interest, opening the door to impeachment by extrinsic evidence²⁴⁰ and a finding that the police witness is interested as a matter of fact.²⁴¹

C. *Expansion of Discovery and Expansion of Cross-Examination*

Upon a sufficient offer of proof, judges can permit discovery of other reports that would not ordinarily be discoverable under prevailing statutes and case law.²⁴² For instance, if a police officer provided dropsy testimony or plain view facts in a pre-trial suppression hearing that was contradicted or cast into doubt by other evidence or offers of proof, the court could require that the other police reports and sworn testimony generated previously by that same officer in similar cases (for example, narcotics cases, contraband cases, weapons possessions cases) be pro-

237. *Brady v. Maryland*, 373 U.S. 83 (1963).

238. See *Brady v. Maryland*, 373 U.S. 83 (1963); *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988).

239. But see Note, *Toward a Constitutional Right to An Adequate Police Investigation: A Step Beyond Brady*, 53 N.Y.U. L. REV. 835 (1975).

240. See generally Chin & Wells, *supra* note 7.

241. See *People v. Bowden*, 198 A.D.2d 39 (N.Y. App. Div. 1993); see generally *Uviller*, *supra* note 178, at 813-15.

242. Police personnel files including police reports of prior incidents have been held to be discoverable in cases where the defendant is accused of violence against a police officer and the defendant is asserting self-defense. See, e.g., *M. v. Superior Court of Los Angeles County*, 144 Cal. Rptr. 418 (1977) (requiring dismissal when the court did not get the State to produce documents and the claim of privilege has been overruled). Police personnel files have been held to be properly discoverable for an in camera inspection to find impeachment material in non-violent criminal cases. See, e.g., *United States v. Kiszewski*, 877 F.2d 210 (2nd Cir. 1989) (requiring the government to produce a file for an in camera review in an extortion prosecution); *People v. Herrera*, 499 N.Y.S.2d 311 (N.Y. Sup. Ct. 1985) (bribery prosecution). Police personnel files, on occasion, have been held to be directly discoverable to the defense in non-violent felony cases. See *People v. Puglisi*, 376 N.E.2d 1325 (N.Y. 1978) (finding harmful error in a narcotics case where the government refused to disclose information from a police officer's personnel file to the defendant for impeachment purposes); *People v. Sumpter*, 347 N.Y.S.2d 670 (N.Y. Sup. Ct. 1973) (holding that where a police officer testifies, the prosecution has a duty to make available to the court any information affecting the defendant's guilt including evidence that affects the credibility of the police officer).

duced—either in camera or directly to the defense—to show a pattern. If it became apparent through admission into evidence of other reports that this particular officer was always arresting 1) people who had mysteriously dropped their narcotics in front of him without provocation, or 2) drivers who kept their weapons unconcealed in plain sight on the passenger seats of their cars, then that pattern of dubious police reporting or testimony could be factored into the court's evaluation of the officer's testimony in the instant case.²⁴³

In this way, expanding the scope of discovery and cross-examination regarding police reports and prior testimonies would serve to eliminate much of the silent presumption of reliability that police witnesses enjoy. In regards to some of Professor Cloud's reasons why judges accept perjured police testimony, such expanded discovery and cross-examination would make it much easier for a judge to determine whether a witness was lying, and particularly the experienced police witness who has mastered the art of testimonial demeanor.²⁴⁴

D. The Swearing Contest and the "Interested" Witness

Expanded discovery and cross-examination would put the police witness on a more level playing field with the defendant in a swearing contest. A defendant is at a distinct disadvantage when taking the stand, whether at a hearing or at trial. The defendant's criminal record is generally known to the judge-as-factfinder. No special attempt has to be made by the prosecution to discover the defendant's rap-sheet—it's usually part of the court file from arraignment forward.²⁴⁵ Rarely does a trial or

243. Judge Younger's own mistrust of dropsy testimony was caused by his witnessing "case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another." Younger, *supra* note 8, at 596-97. In other words, the verbatim repetition itself gave rise to the suspicion that the testimony was tailored and perjurious.

244. Obviously, such expanded discovery would not make it easier on the police department and the prosecution, who, upon court order, would have to deliver up the police witness' prior police reports and testimony in otherwise unrelated cases. Both prosecutors and the department would argue that such discovery was both unduly burdensome and overbroad. On the other hand, many police departments voluntarily take on the burden of creating a double file system to avoid discovery. *See, e.g.,* Palmer v. City of Chicago, 755 F.2d 560, 569 (7th Cir. 1985). As to being overbroad, the court's discovery order could be narrowed to matters of sufficient similarity, with a provision for in camera inspection to avoid a fishing expedition and undue prejudice to the prosecution.

245. New York Code of Criminal Procedure provides pre-trial bail criteria that applies to initial bail determination at arraignment. N.Y. CRIM. PROC. § 510.30(2)(a) (McKinney 1995). One of the criteria is the defendant's criminal record, thereby made available to the court, the People, and the defendant in their respective files.

hearing judge seek to insulate herself from that information in order to be scrupulously fair to the defendant. Rather, the judge-as-factfinder asserts that she is fully capable of considering the facts of the case without regard to irrelevant or unduly prejudicial matters. However, even when prior convictions as relevant to credibility or character are not raised during examination of the defendant witness, the judge-as-fact-finder is not going to be able to easily discount the defendant's past when evaluating the defendant's present reliability under oath. Prior convictions have been deemed relevant to credibility in the broadest possible terms—as showing that the defendant will place his own interest above that of society's.²⁴⁶ A judge-as-factfinder who subscribes to this broad theory of relevance will no doubt evaluate the defendant's credibility through the clouded lens of his criminal history, regardless of the judge's confident pronouncements to the contrary.

More importantly, any judge-as-factfinder will view the defendant witness as an interested witness.²⁴⁷ Standard criminal jury instructions charge that a defendant who testifies is an interested witness as a matter of law.²⁴⁸ Whereas being an interested witness does not render all testimony unworthy of belief,²⁴⁹ there is no doubt it creates a tacit presumption of unreliability, particularly when set against the credibility of a police witness, who enjoys (de facto) a silent presumption of reliability.

Expanding the scope of discovery and cross-examination to include past police reports, testimony, and permitting a thorough litigation of minimalist or falsified police documents may reveal a pattern of police misconduct or false reporting that could show that a police witness will place his own interest (or the interest of making an arrest) above that of society's (or at least above the law). A deeper scrutiny of police testimony and conduct might demonstrate that a police witness is an interested witness, not as a matter of law but as a matter of fact. Whether to meet an arrest quota or earn recognition, promotion, overtime pay, or some other reward, a pattern of misconduct and deceit might prove that a police witness is self-interested in the arrest, prosecution, and conviction of this (or any) defendant. At the very least, such a pattern could prove that the police witness is partial in his testimony, and therefore such bias serves to rebut any unstated presumption of credibility.

246. See, e.g., *People v. McClain*, 178 A.D.2d 495, 496 (N.Y. App. Div. 1991).

247. See *People v. Bowden*, 198 A.D.2d 39 (N.Y. App. Div. 1993); see generally Uviller, *supra* note 178, at 813-15.

248. See, e.g., N.Y. 1 Criminal Jury Instructions (CJI) 7.03.

249. See *People v. Winston*, 52 A.D.2d 432, 384 N.Y.S.2d 457 (N.Y. App. Div. 1976).

E. Police Officers as Expert or De Facto Expert Witnesses

When the prosecution seeks to use police witness testimony to convey specialized knowledge, technical expertise or other kinds of opinion testimony to the trier of fact without having sought qualification of the witness as an expert, judges should nevertheless permit expanded discovery and cross-examination of the police witness as if he were an expert. This would protect against the police witness who injects unsubstantiated or highly prejudicial characterizations into criminal trials. Such characterizations and conclusions are not intentional falsehoods, *per se*, but may not prove to be reliable testimony unless subject to the rigors of pre-trial disclosure and effective cross-examination.

Federal Rule of Evidence 702 permits admission of expert testimony of a scientific, technical, or other specialized nature which will "assist the trier of fact" to understand evidence or to determine a fact in issue.²⁵⁰ Rule 701 of the Federal Rules allows nonexpert witnesses to provide opinion testimony when, as matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or jury.²⁵¹ Police officers often testify as experts, that is, as witnesses deemed qualified to convey specialized or technical knowledge in the form of an opinion to help the trier of fact understand evidence and issues in criminal trials.²⁵² However, police officers more often testify without such qualification from the court, describing events which they have personally observed presented in the form of lay opinion testimony.

Yet even when testifying without having been qualified as an expert, a police witness enjoys many of the advantages of a qualified expert witness. The court is fully aware of that, and will instruct the jury to consider a police officer's testimony as no more credible or less credible

250. FED. R. EVID. 702. This rule states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id.

251. *See* FED. R. EVID. 701. This rule states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Id.

252. *See, e.g.,* *People v. Rivera*, 209 A.D.2d 151 (A.D.C. 1994) (limiting expert testimony regarding behavior patterns of drug dealers to explain absence of pre-recorded buy money was proper); *United States v. Johnson*, 527 F.2d 1381 (D.C. Cir. 1976) (admitting expert opinion by police detective that 26 packets of heroin and 35 tablets of preludin indicated that defendant was a dealer).

than any other witness.²⁵³ The court is also fully aware of how futile such an instruction proves to be in addressing the reality that police witness testimony is inherently different than other kinds of lay testimony.

The police witness is almost always testifying as a "professional," that is, someone deemed to be a trained observer, a trained investigator, trained in the law, trained in enforcement techniques, even trained in testifying. More importantly, the very matters about which the officer testifies are likely to be within the ambit of his profession. He will testify regarding what he heard from witnesses as a trained investigator. He will testify about what he saw with the keen powers of the trained observer. He will testify regarding what judgments he made and what actions he took as a person trained in law enforcement. He will testify about how he vouchered evidence, filled out his reports, and so on—all drawing on his expertise and years of practice, though without express qualification from the court. He will testify with an official imprimatur of sorts, since he testifies subject to two oaths—the oath sworn as a witness to tell the whole truth, and the oath he takes as a police officer to serve, protect and defend the public and the law.

In presenting the police witness to the trier of fact as a lay witness, the prosecutor will also introduce the police witness as a law enforcement professional. Preliminary direct examination will provide basic pedigree information regarding the witness' command, how many years he has been on the force, what special duties he had at the time and place of occurrence, his specialized training, and so on.²⁵⁴ In addition, the officer will draw upon characterizations and conclusions in testimony that necessarily derive from his expertise, for example, that the particular corner observed was a highcrime area;²⁵⁵ that the movements of the suspects prompted an articulable suspicion that they were casing the store for a burglary or robbery;²⁵⁶ that a particular bulge in a suspect's pocket felt during a police patdown indicated the presence of contraband,²⁵⁷ and so on. Courts permit this kind of testimony from police witnesses, with the inevitable conclusions and opinions contained within the testimony, even when not actually qualified as experts.

The effect of this sort of de facto expert testimony is that unqualified police witnesses have great advantages in being able to convey opinion

253. See N.Y. 1 CJI 7.08; *People v. Lopez*, 190 A.D.2d 866 (2nd Dept. 1993).

254. See GARY MULDOON & SANDRA FEUERSTEIN, *HANDLING A CRIMINAL CASE IN NEW YORK* 18 (1995) ("For a police witness, the examination will likely begin with questions regarding the officer's title, experience, work area and assignment, and how the officer's duties brought her/him to the scene.").

255. See *Adams v. Williams*, 407 U.S. 143 (1972).

256. See *Terry v. Ohio*, 392 U.S. 1, 6 (1968).

257. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

testimony of a technical and specialized nature in the guise of lay fact and opinion testimony. The practical advantages to the witness and the prosecution are substantial. First of all, a party can ordinarily challenge any witness' qualifications to take the stand as an expert and give opinion testimony.²⁵⁸ However, regarding a lay police witness who has personal observations to relate, the defense cannot ordinarily challenge the witness' qualifications to testify. Secondly, a lay police witness can easily inject characterizations and opinion into personal observation testimony.²⁵⁹ Such characterizations are part of everyday police argot—for example, calling the subject of an arrest the “perpetrator,” describing the complainant as the “victim,” characterizing a third party as an “accomplice,” “partner,” “lookout,” “steerer,” and so forth. Some of these characterizations, interpolated into personal observation testimony, prove to be very prejudicial to the accused and may prove to be unreliable. Nevertheless, courts will generally permit such opinion testimony under the Federal Rules of Evidence 701 as being of practical necessity in order to convey admissible personal observations.²⁶⁰ Police officers are trained to testify in this manner, injecting prejudicial opinion that does significant damage to the defense.

Lastly, the limits and scope of all testimony rest in the sound discretion of the court. Therefore, a judge is relatively free to permit the injection of such opinion, conclusions, and even hearsay into lay personal observation testimony, subject to reversal on appeal only for an abuse of judicial discretion.²⁶¹ A judge who is predisposed to accredit police testimony is likely to give the police witness a great deal of latitude here. Rarely does that enlarged testimonial scope result in reversal of a criminal conviction.²⁶²

Accordingly, subject to a proper offer of proof demonstrating that the officer's proffered statement is *de facto* expert testimony, the court should permit discovery and cross-examination of the basis of such opinion testimony including facts and data underlying such opinion. This would include treatises, training materials, patrol guides, and police reports and documents upon which the police witness is basing his reasoning and conclusions.²⁶³ The Federal Rules of Evidence permits such extensive

258. See MCCORMICK, *supra* note 176, at § 13.

259. See FED. R. EVID. 701 advisory committee notes (“the practical impossibility of determining by rule what is a ‘fact,’ demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also.”) (citation omitted); see also MCCORMICK, *supra* note 176, at § 11.

260. See FED. R. EVID. 701.

261. See text accompanying *supra* notes 62-63.

262. See *id.*

263. Cf. FED. R. EVID. 702; FED. R. EVID. 703; FED. R. EVID. 705.

discovery and cross-examination for experts, and requires such disclosure upon examination. The Federal Rules of Civil Procedure provide for substantial pre-trial discovery of an expert's basis for his opinion.²⁶⁴ The Federal Rules of Criminal Procedure provide the cross-examiner with advance disclosure of the results of examinations and tests on which the expert relies.²⁶⁵ However defense counsel in federal criminal cases ordinarily learn of the expert's other statements only after the expert has testified on direct examination at trial.²⁶⁶ Both civil and criminal case law give the judge inherent discretionary power to require preliminary disclosure of the basis for an expert's opinion testimony.²⁶⁷ That same discretionary power to require early discovery, expanded discovery, and cross-examination of experts should be extended to de facto experts such as police witnesses who insist on injecting prejudicial opinion and conclusions into lay personal observation testimony.

Trial judges often conduct preliminary voir dire inquiry outside the presence of the jury of opinion witnesses before qualifying them as experts.²⁶⁸ The same voir dire procedure would serve for de facto expert police witnesses as well. The voir dire determination would not necessarily serve to qualify or disqualify the witness, but serve to qualify or disqualify certain kinds of unsubstantiated or unreliable or highly prejudicial (while minimally probative) opinion testimony before the jury hears it. Again, the court already is comfortable in conducting such inquiries of expert witnesses. Expanding the use of voir dire to de facto experts would not be asking the court to do something alien to its own sense of process, and would likely deter the injection of unreliable and unduly prejudicial police testimony in the guise of an account by a witness of his own personal observations.

V. Conclusion

A factfinding judge who knowingly harbors a presumption in favor of police testimony, and who views defendant testimony as inherently tainted by self-interest and criminal propensity will always find facts favoring the prosecution. In other words, a judge who purposefully weighs facts with her thumb on the scale will never be a fair arbiter of the facts. However,

264. See FED. R. CIV. P. 26(b)(4).

265. See FED. R. CRIM. P. 16(a)(1)(D); FED. R. CRIM. P. 16(b)(1)(B).

266. See FED. R. CRIM. PRO. 26.2.

267. See generally Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43 (1986).

268. See FED. R. EVID. 104(c).

a judge who unintentionally but characteristically avoids confronting the issue of police lying can remedy some of the problem by expanding the scope of discovery, cross-examination, and consideration. By that, the judge can raise the issue of credibility to its proper position of importance.

An important consequence of the expansion of proper discovery and cross-examination is the political cover that it would provide judges. If past police reports or testimony show a pattern of deceit or impropriety, the judge can rule unfavorably for the prosecution and properly shift the blame squarely to the police officer. The judge thereby avoids the most politically damaging allegations—that she is soft on crime, that she let a defendant off on a technicality, or that she allowed a runaway jury to deliver a wrong-headed verdict. A judge who is unaccepting of perjurious police testimony cannot be deemed soft on crime, just even-handed as to which crimes she will not tolerate. Neither is the inadmissibility of dishonesty, and particularly lying under oath, a technicality. A fair justice system worthy of respect is premised on credible testimonial evidence subject to the test of truth. A judge who finds, based on the evidence, that a police witness is in part or on the whole unworthy of belief, or who instructs a jury to properly weigh the credibility of a police witness based on an expanded record, will not be politically vulnerable. Political vulnerability comes when a judge rules against the prosecution with insufficient factual basis or premised on unpopular (and often misunderstood) legal doctrines. With a sufficient evidentiary basis, the public, the press, and the party leaders will understand the unacceptability of lying and official misconduct. With that, some proper balance and integrity will be restored to the system.